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In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT F. HANNA, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENT

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Federal Deposit Insurance Corporation (FDIC) is liable for "actual direct compensatory damages," 12 U.S.C. § 1821(e)(3), when it repudiates severance pay contracts with employees who are terminated when the FDIC becomes the receiver of an insolvent financial institution.

II. In *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1231 (1995), this Court mandated a "fact-intensive inquiry" under 29 U.S.C. § 1102 and principles of corporate law into whether an employee benefit plan amendment complies with a plan amendment procedure that reserves amendment power to a corporate employer. The second question presented is whether a reviewing court may forgo that inquiry based solely on the FDIC's mailing (in its capacity as receiver) a notice that an employee benefit plan has been terminated.

PARTIES TO THE PROCEEDING

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The appeal in *Hennessy* v. *FDIC*, No. 94-1857, which was decided together with the cases subject to this petition, is the subject of a separate petition. The parties to that case are listed in that petition.

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PETITION FOR A WRIT OF CERTIORARI

Robert F. Hanna, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-30a, is reported at 58 F.3d 908. The order of the court of appeals denying rehearing, App., *infra*, 70a-73a, is reported at 66 F.3d 659. The opinions of the district court in *Campbell* v. *FDIC*, App., *infra*, 35a-47a, and *Adolf* v. *FDIC*, App., *infra*, 33a-34a, are unreported. Those opinions incorporate in part by reference an opinion of the district court in a related case, *Hennessy* v. *FDIC*, App., *infra*, 49a-60a, which is reported at 858 F. Supp. 483. The opinion of the district court denying class certification in the *Campbell* case, App., *infra*, 61a-69a, is unreported.

JURISDICTION

The court of appeals entered its judgment on June 29, 1995. App., *infra*, 1a-30a. A timely petition for rehearing was denied on September 26, 1995 (App., *infra*, 70a-73a), and a petition for a writ of certiorari is accordingly due on December 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case, 12 U.S.C. § 1821(e) and 29 U.S.C. § 1102(b), are set forth in pertinent part in the Appendix, *infra*, at 74a-75a.

STATEMENT

This case involves two attempts—each successful in the court below—by the Federal Deposit Insurance Corporation ("FDIC") to expand its powers beyond permissible statutory bounds to the disadvantage of the employees of a failed bank. First, as receiver for the bank, the FDIC repudiated the bank's agreement to pay its employees severance pay, but

refused to pay damages for the repudiation. Second, the FDIC purported to terminate life insurance and retiree medical insurance plans, but was excused by the court below from the "fact-intensive inquiry," required by this Court in *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1231 (1995), into whether the purported terminations complied with written procedures. In both instances, the Third Circuit erroneously allowed the FDIC to evade statutory limitations on its power. Both issues warrant further review.

A. The Statutory Scheme Of Repudiation And Damages Under FIRREA

The Federal Deposit Insurance Act of 1933, 12 U.S.C. § 1811 *et seq.*, as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, and subsequent legislation (collectively "FIRREA"), provides a comprehensive system for regulating the financial integrity of banks and savings and loan associations. FIRREA authorizes the FDIC to accept appointment as the receiver or conservator of an insolvent federal or state depository institution. 12 U.S.C. § 1821(c).

FIRREA enumerates the FDIC's powers when it acts as the conservator or receiver of a failed institution. 12 U.S.C. § 1821(d). Among other things, the FDIC may operate an institution, sell its assets, and determine and pay claims against it. *Ibid.* The FDIC also has the power to "disaffirm or repudiate any contract or lease" of the institution if the FDIC determines that the contract or lease is "burdensome" and that its "disaffirmance or repudiation * * * will promote the orderly administration of the institution's affairs." *Id.* § 1821(e)(1).

The FDIC does not escape liability for the contracts that it repudiates. With certain exceptions not relevant here, however, the FDIC's liability is "limited to actual direct compensatory damages" determined as of "the date of the

appointment of the conservator or receiver." 12 U.S.C. § 1821(e)(3)(A). The statute does not affirmatively define "actual direct compensatory damages," but specifically excludes from their scope "punitive or exemplary damages," "damages for lost profits or opportunity," and "damages for pain and suffering." *Id.* § 1821(e)(3)(B).

In addition, the FDIC *can* prohibit "golden parachute" payments outright. 12 U.S.C. § 1828(k). The FDIC has proposed a regulation that would specifically exclude from the definition of "golden parachute payment" any "payment made pursuant to a nondiscriminatory severance pay plan" that provides payments for 12 months or less. Regulation of Golden Parachutes and Other Benefits Which May Be Subject to Misuse, 60 Fed. Reg. 16,069, 16,079-16,080 (1995) (second notice of proposed rulemaking).

B. The Statutory Requirements For Amending An Employee Welfare Plan Under ERISA

The Employment Retirement Income Security Act of 1974, Pub. L. No. 94-406, 88 Stat. 832, 29 U.S.C. § 1001 *et seq.* ("ERISA"), sets out a comprehensive system for the regulation of certain employee benefit plans. ERISA divides employee benefit plans into two categories with regulatory requirements that differ in some respects: "employee pension benefit plans" (29 U.S.C. § 1002(2)) and "employee welfare benefit plans," which include plans for medical insurance, life insurance, and severance pay (*id.* § 1002(1)).

All plans subject to ERISA must be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Moreover, Section 402(b) of ERISA, 29 U.S.C. § 1102(b), requires every ERISA plan to set forth procedures for funding the plan, for allocating responsibilities for plan operation and administration, and for making payments to and from the plan. *Id.* § 1102(b)(1), (2), (4). At issue in this case is the requirement that the documents establishing each plan "provide a procedure for amending

such plan, and for identifying the persons who have authority to amend the plan." *Id.* § 1102(b)(3).

C. Factual Background

The petitioners are former employees of Meritor Savings Bank. Meritor (formerly the Philadelphia Savings Fund Society, or PSFS), the first savings bank in the United States, had operated for 176 years when regulators closed it in 1992. Some of the petitioners had been employed at Meritor for decades. Petitioner Hanna, for example, had worked for Meritor for nearly 40 years, while petitioner DeMarco had begun at Meritor as a teenager and had served nearly 30 years. *Campbell* C.A. App. 3a-4a.[1]

1. The Meritor Employee Benefit Plans.

Three of the employee benefit plans that Meritor provided are at issue in this case. The Meritor Savings Bank Separation Pay Program ("Separation Plan") provided severance benefits to involuntarily terminated employees based on their final salary and length of service. *Campbell* C.A. App. 125a-135a. The Meritor Group Life Insurance Plan (*id.* at 144a-157a) provided life insurance to employees and retirees, and the Meritor Medical Plan 65 provided medical insurance to qualified retirees (*id.* at 158a-196a). We refer to the Life and Medical Plans as the "Insurance Plans."

a. Under the terms of the Separation Plan, an employee was eligible for severance payments at full salary for up to 26 weeks, depending on length of service, upon being

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[1] We refer to the appendix below in *Campbell* v. *FDIC*, No. 94-1933, as "*Campbell* C.A. App.," and the appendix in *Adolf* v. *FDIC*, No. 94-1934, as "*Adolf* C.A. App." See pp. 9-10, *infra*. Aside from the complaints and the docket sheets, the contents of the two appendices were almost identical.

> involuntarily terminated for organizational reasons associated with lack of work, job elimination, reorganization, or reduction in force not prompted by the actions discussed in paragraph 3 * * * .

Campbell C.A. App. 129a; *id.* at 130a-131a. See App., *infra*, 5a, 14a. Paragraph 3 of the Separation Plan set out a specific exclusion from eligibility. An employee would not receive severance pay only if (A) Meritor sold, transferred, contracted, or "otherwise dispose[d] of its business, any portion or unit of its business, or any group of assets" *and* (B) "the successor entity offer[ed] employment in any capacity" to the affected employee. *Campbell* C.A. App. 129a. That provision was intended to make clear that employees who were immediately employed by successor companies were not eligible for severance pay. *Id.* at 358a-359a. If the successor entity did *not* offer the employee a position, and if Meritor could not employ the person in another capacity, the affected employee would "be considered *job eliminated* and w[ould] be provided with separation pay." *Id.* at 129a (¶ 4) (emphasis added). And an employee who found a job with another company within the severance benefit payment period would "receive a single-sum cash payment equal to the remaining separation pay to which he/she would have been entitled had he/she remained unemployed." *Id.* at 131a.

Christine Kramer was the officer who drafted the Separation Plan for Meritor. *Campbell* C.A. App. 357a, 362a. At the time, Kramer was an assistant vice president of the bank; she left Meritor in August 1990, more than two years before the bank was closed. *Id.* at 355a. Kramer testified that the Separation Plan was intended to cover "anything that could happen to th[e] bank" or to an employee working in it, including an involuntary closure of the bank by regulatory authorities. *Id.* at 362.1a.

b. The Insurance Plans provided some of the petitioners with life and medical insurance. Under the Life Plan, Meritor paid for term life insurance with a death benefit that was double the salary of current employees. *Campbell* C.A. App. 405a-406a. For retirees, the benefit amount was the lesser of $50,000 or one-quarter the amount provided at the time of retirement. *Id.* at 406a. Under the Special Option of the Medical Plan, Meritor provided self-insured health coverage to 482 retirees, who did not have to pay premiums. *Id.* at 164a, 406a. Meritor stated in the Medical Plan document that it "intends the plan to be permanent, but * * * reserves the right to amend, modify or terminate the plan at any time." App., *infra*, 38a. Likewise, Meritor "reserve[d] the right to terminate the group life insurance policy for its employees and retirees at any time." App., *infra*, 37a.

2. Closure and Receivership of Meritor.

Meritor began having financial difficulties in the 1980s. One source of its problems was its 1982 acquisition of the deeply insolvent Western Savings Fund Society; Meritor had assumed Western's liabilities in exchange for substantial "supervisory goodwill" related to that transaction, temporarily easing Meritor's regulatory burden without improving its financial situation—until a change in law and FDIC policy ten years later left Meritor without the protection of that goodwill.[2] Cf. *Winstar Corp.* v. *United States*, 64 F.3d 1531 (Fed. Cir. 1995) (en banc) (holding federal government liable for breach of contract upon denial of supervisory goodwill under similar circumstances), pet. for cert. filed, No. 95-865 (Dec. 1, 1995).

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[2] See *PSFS Official To Sue U.S. Government*, PHILA. BUS. J., May 3, 1993, at 1; Cassel, *Death of an Institution: The Final Chapter for PSFS*, PHILA. INQUIRER, Dec. 21, 1992, at F01; *Meritor Stockholders May Sue If FDIC Reverses Its Decision*, PHILA. BUS. J., Dec. 14, 1992, at 10.

Most of the senior executives who made the decisions in the early and mid-1980s that led to Meritor's failure were long gone by the time the bank was closed, however. Stock, *PSFS Workers Meet A Cruel End*, PHILA. INQUIRER, Dec. 16, 1992, at D07. Meritor attempted a turnaround between 1988 and 1992, reducing its work force to approximately 1,000 employees from about 4,500. App., *infra*, 51a n.1. In addition, Meritor sold some of its suburban branches, along with the right to use its well-known PSFS trade name, to the Mellon Bank in 1990. Less than two years later, in early 1992, Meritor proposed to the FDIC that Meritor would sell its remaining banking business and assets to Mellon. App., *infra*, 53a n.4. Under that plan Meritor would have survived in order to liquidate its assets and repay its loan from the FDIC. McCarron Dep. 22-23. Meritor employees would have received severance benefits, and Meritor stockholders would have shared any surplus once all assets were liquidated. *Id.* at 22-27.

The FDIC never rejected Meritor's proposal; it "executed it," simply cutting Meritor and its employees out of the deal. McCarron Dep. 24-25. In the words of a former Meritor officer, "We did such a good job of convincing [the FDIC] that this franchise could net many millions of dollars, that they sold it without us." *Ibid.* Thereafter, on December 11, 1992, and at the FDIC's urging, the Pennsylvania Secretary of Banking declared Meritor insolvent and directed that the bank be closed. App., *infra*, 5a. See *PSFS Deal Makes Mellon Top Dog Locally*, PHILA. BUS. J., Dec. 21, 1992, at 3. On the same day, the Secretary appointed the FDIC as receiver for Meritor. App., *infra*, 5a. The FDIC thereupon entered into a Purchase and Assumption Agreement with Mellon Bank, under which Mellon acquired the Meritor branches and certain other assets and liabilities (including approximately $2.6 billion in loans and all $2.9 billion in depositor accounts), in exchange for a $181 million payment. App., *infra*, 52a & n.5; *Campbell* C.A. App. 240a, 413a.

Aside from the obvious absence of a role for Meritor, the plan was virtually identical to the proposal Meritor had made earlier, but without provisions to protect Meritor employees. McCarron Dep. 23-25.

The FDIC retained and has been liquidating hundreds of millions of dollars of Meritor's remaining real estate and other assets. App., *infra*, 52a. The FDIC also retained an 80% share in the net recoveries (or losses) on many of the Meritor loans that Mellon purchased. *Campbell* C.A. App. 240a-248a. The liquidation proceeds and loan recoveries have led to substantial recoveries for non-depositor creditors. Those creditors are paid in "receivership certificates," which were being paid at 87.3% of face value at the time summary judgment was granted, *Campbell* C.A. App. 392a, and are now paid at more than 99% of face value. It appears likely that there will be a stockholders' surplus in the estate.

On the day it became the receiver of Meritor, the FDIC terminated all the Meritor employees (App., *infra*, 53a & n.6), and convened a meeting of Meritor employees that afternoon (*id.* at 7a). In a one-word response—"No"—to an employee's question at that meeting, the FDIC's closing manager informed the employees that the severance benefits they had earned would not be paid. *Ibid.*

Mellon opened the Meritor branches on the next business day under the name "Mellon-PSFS." App., *infra*, 7a. A small number of Meritor employees worked temporarily at the former Meritor branches, but they were not employed by Mellon or by the FDIC. See *id.* at 53a n.6. Instead, they became temporary employees of KeyTech, Inc., an employment service that staffed the former Meritor branches as an independent contractor to Mellon. *Ibid.* Mellon eventually hired a handful of former Meritor employees, and paid severance benefits of up to four weeks' salary to former Meritor employees who were subsequently laid off from KeyTech. *Ibid.*

Later in December, an employee benefits specialist for the FDIC sent a one-page, unsigned notice on FDIC letterhead to the Meritor employees and retirees asserting that the FDIC had terminated the Life and Medical Plans pursuant to the terms of each plan. App., *infra*, 7a; *Campbell* C.A. App. 408a, 411a; Lussier Cert. Ex. A. The notices also mentioned that continuation medical coverage was available, and provided instructions for filing claims for benefits under the FDIC's statutory claims process. App., *infra*, 7a-8a.

The petitioners submitted claims to the FDIC under all three benefit plans at issue in this case. The FDIC denied the claims.

D. Proceedings Below

1. The petitioners filed two actions in the United States District Court for the Eastern District of Pennsylvania in July 1993. *Campbell* C.A. App. 1a-124a; *Adolf* C.A. App. 38a-73a (first amended complaint). Jurisdiction in each case rested on 28 U.S.C. § 1331. One action, *Campbell* v. *FDIC* (No. 93-CV-3969), presented the individual and class action claims of petitioners Hanna, DeMarco, Campbell, and Voth, challenging the repudiation of the Separation Pay Plan and the termination of the Insurance Plans. The remaining petitioners filed an action raising the same issues individually. *Adolf* v. *FDIC* (No. 93-CV-1499).[3]

The petitioners sought to recover payments due under the Separation Plan; with respect to the Insurance Plans, the petitioners sought continued coverage, along with reimbursement for premiums paid for continuation or substitute coverage after the purported terminations. App., *infra*, at 9a, 11a.

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[3] Petitioners Campbell and Voth were added as plaintiffs to the first amended complaint filed in *Adolf* in July 1994 after the district court held that their claims in the *Campbell* action had been filed prematurely. App., *infra*, 10a n.4, 11a n.5. See 12 U.S.C. § 1821(d)(5).

The FDIC took the position that it had repudiated the Separation Plan under 12 U.S.C. § 1821(e)(1). *Campbell* C.A. App. 405a. It did not claim to have repudiated the Insurance Plans, but instead claimed that it had terminated each Plan pursuant to its terms. *Id.* at 411a.

After the district court denied class certification in *Campbell*, App., *infra*, 61a-69a, the petitioners and the FDIC filed cross-motions for summary judgment. The district court entered judgment for the FDIC in both *Campbell* (App., *infra*, 35a-47a) and *Adolf* (App., *infra*, 33a-34a). In granting summary judgment against the petitioners' claims for damages for the repudiation of the Separation Plan, the district court incorporated by reference its opinion in another case involving that Plan, *Hennessy* v. *FDIC* (No. 93-CV-5589), App., *infra*, 49a-60a. See App., *infra*, 43a (*Campbell*); *id.* at 33a (*Adolf*). In *Hennessy*, the district court held that the breach of an obligation to make severance payments did not result in "actual direct compensatory damages" within the meaning of FIRREA. 12 U.S.C. § 1821(e)(3). App., *infra*, 58a. The district court relied on *Howell* v. *FDIC*, 986 F.2d 569 (1st Cir. 1993), agreeing with the First Circuit that severance payments were "an estimate of likely harm made at a time when only prediction is possible" and thus were "analogous to 'liquidated damages.'" App., *infra*, 59a (quoting *Howell*, 986 F.2d at 573). In addition, the district court held that Meritor employees who were terminated by the FDIC could not recover damages because they did not have a "vested right to severance pay" when the FDIC became the receiver for the bank. App., *infra*, 56a.

The district court also granted summary judgment for the FDIC on the petitioners' claim that the FDIC had purported to terminate the Insurance Plans without complying with Section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3). App., *infra*, 43a-44a. The district court held that Section 402(b)(3) applies only to plan amendments, not terminations. *Id.* at 44a.

2. The Third Circuit heard the appeals of *Campbell* and *Adolf* together with that of *Hennessy*, and affirmed the district court in all three cases. App., *infra*, 1a-30a. The court of appeals noted, at the outset, that it harbored some doubt that the petitioners' contractual rights to severance pay had been triggered by their termination. *Id.* at 11a-15a. The court acknowledged, however, that the Plan provisions were "susceptible to more than one reasonable interpretation," and it added that, under such circumstances, it "would normally commit the task of construing ambiguous contract terms to the fact finder after extrinsic evidence has been adduced." *Id.* at 18a. Even so, the court affirmed the district court's grant of summary judgment, solely on the ground that the FDIC had properly repudiated the Separation Plan and owed no damages under it. App., *infra*, 18a, 21a-24a. See also *id.* at 15a n.7 (unnecessary to resolve "triggering" issues in light of holding on repudiation and damages).

Like the district court, the Third Circuit held that the repudiated severance payments are not "actual direct compensatory damages" that could be recovered under Section 1821(e)(3). App., *infra*, 24a. The court of appeals recognized that "the question is close" (*id.* at 22a) and that the D.C. Circuit "has taken a different view" (*id.* at 23a), but concluded that severance payments are "analogous to 'liquidated damages'" and as such are not compensable under Section 1821(e)(3). *Id.* at 24a. In addition, the court of appeals agreed with the district court that "no vested benefits accrue" under a severance pay plan until after an employee is terminated, so that the petitioners' "right to severance benefits was still contingent" when the FDIC was appointed as receiver; for that reason as well, the court believed, the petitioners could not recover damages. *Id.* at 17a.

The court of appeals also rejected the petitioners' claim that the FDIC had improperly terminated the Insurance Plans. Contrary to the district court, the court of appeals held that Section 402(b)(3) of ERISA applied to terminations

of benefit plans as well as to amendments. App., *infra*, 25a. On the authority of *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223 (1995), however, the court went on to hold that Meritor's one-sentence reservation of power to amend the Insurance Plans complied with that Section. App., *infra*, at 25a-27a. But the Third Circuit did not conduct the "fact-intensive inquiry" into which persons had the authority to terminate the Insurance Plans, and whether those persons had in fact accomplished the termination, that this Court required in *Curtiss-Wright*. See 115 S. Ct. at 1231. Instead, the court below simply stated that "an official receiver has great discretion in taking action that would previously have been handled through the normal methods of corporate governance," noted that the FDIC had sent the petitioners "mailings notifying them of the termination" of the Insurance Plans, and "decline[d] to require further investigation into the methods by which the FDIC makes its decisions." App., *infra*, 27a.

REASONS FOR GRANTING THE PETITION

This case presents new examples of the FDIC's "facile approach" to the statutes that govern it. *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048, 2055 (1994). Once again, the FDIC has contended—successfully—that FIRREA must be construed to prevent the "forgoing of *any* money which, under any *conceivable* legal rules, might accrue" to the deposit insurance fund. *Ibid.*

Unsatisfied with its broad authority as receiver to discharge financial institution employees and to repudiate their severance benefits, the FDIC has insisted upon (and in two Circuits, obtained) the ability to avoid paying damages for the repudiation. As the FDIC has conceded, this issue has deeply divided the courts of appeals and is of exceptional importance. Certiorari is clearly warranted.

The court below also granted the FDIC an exemption from the "fact-intensive inquiry" that is necessary to deter-

mine whether a purported termination of an employee benefit plan complies with the plan's written amendment procedure. See *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1231 (1995). The Court should grant certiorari on this issue as well in order to ensure that the lower courts follow the directions given in *Curtiss-Wright*, and to make clear that the FDIC, too, must comply with the employee-protective procedural provisions of ERISA.

I. THE COURT SHOULD RESOLVE THE DEEPENING CONFLICT IN THE CIRCUITS OVER WHETHER THE FDIC'S REPUDIATION OF A CONTRACT TO MAKE SEVERANCE PAYMENTS GIVES RISE TO "ACTUAL DIRECT COMPENSATORY DAMAGES" WITHIN THE MEANING OF FIRREA

The Third Circuit—following the First Circuit, but in conflict with the D.C. and the Ninth Circuits—erroneously held that the FDIC may repudiate contracts to make severance payments to employees who are terminated upon the FDIC's assuming the receivership of a bank, without being liable for damages under 12 U.S.C. § 1821(e). This Court should grant certiorari to resolve the conflict among the circuits on this important issue of federal law.

A. The Decision Below Squarely Conflicts With Decisions Of The District Of Columbia And Ninth Circuits

The Third Circuit candidly acknowledged (at App., *infra*, 22a) that "the courts are split over the proper interpretation of [Section 1821(e)(3)]." Like the Third Circuit, the First Circuit has held that the FDIC may repudiate severance pay agreements without paying damages. As the Third Circuit recognized (*id.* at 23a), however, "the Court of Appeals for the District of Columbia Circuit has taken a different view" of the matter. See also *ibid.* (in choosing a rule of decision, the court was "confronted with division amongst the

courts"). The Ninth Circuit has since deepened the conflict, joining the D.C. Circuit in holding, contrary to the First Circuit and the court below, that an employee who is terminated when his employer enters an FDIC receivership is entitled to "actual direct compensatory damages" within the meaning of Section 1821(e)(3)(A)(i). The FDIC would be hard-pressed to deny the conflict, having recently told the Ninth Circuit that *its* decision "is contrary to decisions of the United States Court[s] of Appeals for the First and Third Circuits," citing the decision below. Petition for Rehearing With Suggestion for Rehearing *En Banc* of the FDIC i, *Monrad* v. *FDIC*, No. 93-56221 (9th Cir. filed Sept. 21, 1995) ("FDIC *Monrad* Petition").

1. The Third Circuit followed the earlier decision of the First Circuit in *Howell* v. *FDIC*, 986 F.2d 569 (1993). App., *infra*, 24a. There, the court held that "the statutory language—'actual direct compensatory damages'—does not quite embrace" severance payments. 986 F.2d at 573. In the First Circuit's view, severance payments "are analogous to 'liquidated damages'" for whatever injury an employee may have sustained by remaining at a failed bank instead of taking other employment, or might sustain as a result of post-termination unemployment; such liquidated damages, the court believed, were not "actual damages" within the meaning of the statute. *Ibid.* Although the court recognized that "a severance agreement may * * * provide a cause of action for an at will employee who otherwise has no contractual claim at all," it did not consider the implications of that fact and simply concluded, without analysis, that "the at will status of the appellants is not decisive." *Id.* at 573 n.3.

2. By contrast, in *Office and Professional Employees Union* v. *FDIC*, 27 F.3d 598, 604 (1994) ("*OPEIU*"), the D.C. Circuit held that, when an employee has an at-will contract, "severance payments are properly characterized as consideration for entering into (or continuing) the employment contract, and therefore are compensable as actual

damages under FIRREA when the contract is repudiated." Explicitly rejecting the First Circuit's contrary view, the D.C. Circuit explained that the First Circuit "mischaracterized the nature of severance provisions in employment contracts" when it suggested in *Howell* that severance payments were akin to liquidated damages for the breach of an employment contract: severance payments could not be liquidated damages for the act of termination because termination alone does not breach an at-will employment contract at all. *Ibid.* Instead, the provision for severance payments modified the at-will relationship; the bank still could discharge the employees for economic reasons, but "if it did so in a way that activated the [severance pay] clause, it was obligated to make severance payments." *Ibid.* The employee's injury therefore "occurs when the contractual right is repudiated" and the employees lose part of the consideration for their employment, regardless of whether they "would have had other options when they entered into the contract or whether they could find comparable jobs after termination." *Ibid.*

The same analysis also led the D.C. Circuit to reject the argument (approved in passing by the Third Circuit in this case (App., *infra*, 15-18a)) that "a right to severance payments is not 'vested' until the actual economic layoff takes place." 27 F.3d at 604. The D.C. Circuit drew an analogy to standby letters of credit, which do not obligate a bank to pay unless a third party defaults at some later date. The court noted that a receiver is liable for the standby letter even if the third party does not default until after the bank's insolvency, and could "see no reason why the result should be different for severance payments where the termination is not effected until after the appointment of the receiver." *Id.* at 603.

More recently—following the D.C. Circuit and expressly rejecting the reasoning of the First Circuit and the court below—the Ninth Circuit held, "Severance payments are

properly characterized as compensable as actual damages under FIRREA when the contract is repudiated." *Monrad* v. *FDIC*, 62 F.3d 1169, 1174 (1995). After setting out the division between the approaches of the First and D.C. Circuits (*id.* at 1172), and recognizing that the decision below relied on *Howell* (*id.* at 1173 n.3), the *Monrad* court held that severance pay agreements are "enforceable modifications of at will employment," whether or not they are included in a collective bargaining agreement. *Id.* at 1174. The Ninth Circuit concluded that "*OPEIU* offers the better-reasoned approach" (*ibid.*) and "effectively rebuts *Howell*" (*id.* at 1173 n.3). The court also followed *OPEIU* rather than the court below on the "vesting" issue: "that the actual termination date post-dates the appointment of the receiver is insufficient to defeat an otherwise valid claim to severance pay." *Id.* at 1174.

3. The FDIC is acutely aware of the conflict in the circuits. Indeed, it emphasized to the Ninth Circuit the "divergence of the holdings in *OPEIU* from those in *Howell* and *Hennessy*" (FDIC *Monrad* Petition, *supra*, at 8), and urged that Circuit to rehear its *Monrad* case and to follow "the contrary holdings of *Howell* and *Hennessy*" (*id.* at 6).

4. In short, four circuits have passed upon the first question presented in this case. In the District of Columbia and Ninth Circuits, employees may recover damages for severance benefit agreements that have been repudiated by the FDIC. In the First and Third Circuits, they may not. Had Meritor delayed a few weeks in disposing of its subsidiary's branches in Washington, D.C.,[4] the intolerable implications of this conflict would have become dramatically clear: employees in the Washington branches would have recovered damages, while their colleagues in Philadelphia,

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[4] See *Meritor Stockholders May Sue If FDIC Reverses Its Decision*, PHILA. BUS. J., Dec. 14, 1992, at 10.

the petitioners, would have had no remedy for the breach of an identical agreement. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 (1971) (principal place of performance governs choice of law for action on services contract). The Court should grant certiorari to resolve this conflict.

B. Whether Repudiated Severance Benefits May Be Recovered As "Actual Direct Compensatory Damages" Is A Question Of Exceptional And Recurring Importance

As we explained above, courts of appeals from four Circuits have decided whether repudiated severance benefits may be recovered as "actual direct compensatory damages" since early 1993. Moreover, as the FDIC has acknowledged (C.A. Br. 23-24), the issue has also percolated widely in the district courts, as employees have sought damages for repudiated severance pay agreements in a broad array of cases.[5] *E.g.*, *Westport Bank & Trust Co.* v. *Geraghty* v. *FDIC*, 865 F. Supp. 83, 86 (D. Conn. 1994), on appeal, No. 95-6101 (2d Cir. argued Dec. 20, 1995); *LaMagna* v. *FDIC*, 828 F. Supp. 1 (D.D.C. 1993); *Rush* v. *FDIC*, 747 F. Supp. 575 (N.D. Cal. 1990); *McMillan* v. *FDIC*, No. 93-0273-CIV-MOORE (S.D. Fla. Aug. 31, 1994); *D'Ambra* v. *FDIC*, No. 92-3399 (E.D.N.Y. Oct. 4, 1993); *RTC* v. *Flaherty*, No. SA-90-CA-986 (W.D. Tex. Aug. 20, 1993); *Lanigan* v. *RTC*, No. 91-C-7216, 1993 WL 792085 (N.D. Ill. Mar. 30, 1993); *Barnes* v. *RTC*, No. Civ. A 91-2011-V, 1992 WL 2203 (D. Kan. Jan. 14, 1992); *Borodinsky* v. *RTC*, Civ. No. 90-2606 (CSF), 1992 WL 5218 (D.N.J. Jan. 6, 1992).

Again, the FDIC would be hard-pressed to deny the "exceptional importance" of the point. FDIC *Monrad* Petition, *supra*, at i. It used those very words in characterizing to the Ninth Circuit the "important and recurring legal

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[5] See also Brief for Appellee FDIC 19-20, *Westport Bank & Trust Co.* v. *Geraghty* v. *FDIC*, No. 95-6101 (2d Cir.) (filed Sept. 8, 1995).

question" that is presented in this case as well as in *Monrad*. *Id*. at 15. The FDIC similarly told the Second Circuit that "the issue * * * whether the FDIC is liable for severance pay as damages under 12 U.S.C. § 1821(e) when it repudiates an employment contract for severance pay * * * is extremely significant" with consequences that reach beyond any individual case. Appellee FDIC's Unopposed Motion to Adjourn and Reschedule Oral Argument, *Westport Bank & Trust Co.* v. *Geraghty* v. *FDIC*, No. 95-6101 (filed Nov. 8, 1995).

The FDIC's concern is well-founded; it currently oversees some 900 active receiverships. FDIC 1994 ANNUAL REPORT 31 (1995). In the six years ending in 1994, 672 banks failed; although currently at a low ebb, bank failures have averaged more than one hundred per year since 1982. *Id*. at 34-35. Since 1989, more than 700 thrifts have been closed as well. *RTC Review* (June 1995), at 1-3.

The importance of the issue was not lost on the court below, which recognized that this case raised significant and "competing policy considerations." App., *infra*, 24a. In the court's view, Congress's intent "to scale back damage claims" was arrayed against "the fact that disallowance of promised severance pay may chill a troubled bank's ability to effectively retain able employees." *Ibid*. See also *Howell*, 986 F.2d at 573.

The latter concern intensifies the importance of this issue and thus of this case. Modest severance pay agreements are a common employee benefit in the financial industry as elsewhere. Braun, *How to Bulletproof Compensation Programs*, AM. BANKER, Aug. 30, 1993, at 18; Casciari & Payne, *Severance Payments: An ERISA Plan?*, PROBATE & PROPERTY, Sept./Oct. 1991, at 40. Indeed, as one commentator recently observed, the result in the decision below and in *Howell* is especially "startling given that many troubled banks and thrifts offered their managers severance agreements as compensation for their continued employment at a

time when the futures of the institutions employing them were highly uncertain." Sennello, Note, *FIRREA's Damage Provisions: Inequitable, Unnecessary, and Costly to Boot*, 45 DUKE L. J. 183, 194 (1995). Precarious financial institutions most need to attract and hold able and experienced personnel. See Regulation of Golden Parachutes and Other Benefits Which Are Subject to Misuse, 56 Fed. Reg. 50,529, 50,531 (1991) (first notice of proposed rulemaking). Severance pay is one obvious way to compensate employees for their loyalty in unsettled conditions. See Braun, *supra*, at 18.[6]

As a result, the availability of damages for severance benefits is a crucial issue not only (concededly) for the FDIC, but for the thousands of employees of financial institutions that have been, or will be, closed for insolvency. The Court should grant certiorari to decide this recurring and important issue.

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[6] Broad-based severance pay plans are rarely lavish (see Braun, *supra*, at 19); the benefits provided by Meritor's Separation Plan come well within the limit to one year's salary that is contained in the FDIC's proposed regulations to implement the "golden parachute" provisions, which were added to FIRREA in order to allow the FDIC to disallow excessive severance agreements. Regulation of Golden Parachutes and Other Benefits Which Are Subject to Misuse, 60 Fed. Reg. 16,069, 16,080 (1995) (second notice of proposed rulemaking). See 12 U.S.C. § 1828(k); see also 11 U.S.C. § 502(b)(7) (Bankruptcy Code's similar duration limit for such payments). The FDIC has not claimed that the petitioners' claims for separation pay—none of which exceeds $ 55,000, and most of which are less than half that sum—constitute golden parachute payments within the meaning of FIRREA.

C. The Third Circuit Erroneously Held That Damages For Breach Of A Contract To Pay Severance Benefits Were Not "Actual Direct Compensatory Damages" Under FIRREA

The First Circuit aptly observed in *Howell* that "[a] stranger to [Section 1821(e)] might think it apparent that breach of a contract to make severance payments inflicts damages on the discharged employee in the amount of the promised payments." 986 F.2d at 572. We agree that a common-sense reading of the statute compels that result. See, *e.g.*, *Asgrow Seed Co.* v. *Winterboer*, 115 S. Ct. 788, 793 (1995) ("ordinary meaning" of terms normally should govern statutory interpretation). Yet both the First Circuit and the court below held that severance payments are instead unrecoverable liquidated damages for employees' potential loss of income between jobs, or for opportunities they may have forgone by remaining with their employer.

It is no wonder that the First Circuit arrived at its holding only with "some misgivings" (*Howell*, 986 F.2d at 572), and that the court below followed *Howell* only after conceding that the "question is close" (App., *infra*, 22a). Common sense and the governing legal doctrines equally require that the petitioners be allowed to recover as "actual direct compensatory damages" their *pro rata* share of the severance payments owed them.

1. Damages for the breach of a covenant to make severance payments are "actual direct compensatory damages." As the D.C. Circuit explained, the "promise to make severance payments is part of the *consideration* of the employment contract." *OPEIU*, 27 F.3d at 603. The covenant for severance pay is an enforceable modification of the at-will employment relationship between Meritor and the petitioners. Meritor could terminate the petitioners for economic reasons without being liable for damages for breach of the *employment contract*, but if it terminated them

in a way that activated the Separation Plan, it was "obligated to make severance payments." *Id.* at 604; see *Monrad*, 62 F.3d at 1174.

Accordingly, and contrary to the holding below, the promise of a severance payment is not a liquidated damages provision. Because a bank does not breach an at-will employment contract by terminating employees, there are no "damages" to "liquidate." Severance payments also are not analogous to the more speculative "damages for lost profits or opportunity" that are explicitly excluded in Section 1821(e)(3)(B)(ii). The obligation to pay severance pay is fixed once an employee has served long enough to qualify; only the amount varies as his length of service increases and his salary changes. By contrast, "whether future profits and opportunities will be realized at all is a matter of speculation, since they have not accrued at the time of the repudiation." *OPEIU*, 27 F.3d at 604. Lost profits and opportunity damages "look[] to what the plaintiff would have earned in the future but for the breach." *Ibid.* A defendant owes them to a plaintiff because, had there been no breach, the plaintiff would have been in a position to earn the claimed sums from someone other than the defendant. Where a breached severance pay agreement underlies an action, the plaintiff has already accrued or earned the amount sought as contract damages by working for—and remaining with—the employer.

2. For similar reasons, the petitioners' entitlement to severance pay had accrued and was enforceable when Meritor became insolvent even though they were not terminated until that day. An obligation need not be absolute at the time of insolvency in order to be recoverable upon repudiation. *Nashville Lodging Co.* v. *RTC*, 59 F.3d 236, 244 (1995); *Citizens State Bank of Lometa* v. *FDIC*, 946 F.2d 408, 411-416 (5th Cir. 1991). Employees earn their severance benefits—and their right to those benefits accrues—when they work for a long enough period to qualify for severance pay. Only the amount (which depends on their

salary and length of service when discharged) and not the fact of the obligation is uncertain. See *OPEIU*, 27 F.3d at 604.

That contingent right to severance benefits is not "worthless until the date of termination," but is "part of the employee's compensation package which, like health or life insurance, has a real present value." *OPEIU*, 27 F.3d at 601. The employees' claims are "contingent" only in the sense that "the value of the severance payments under the agreement should be discounted for the risk that the employees would * * * be discharged" for reasons that did not entitle them to severance pay, that is, the risk that they "would quit, retire, die, or be discharged for misconduct." *Ibid.*

But these uncertainties "deal not with *whether*" the petitioners "have a claim but rather with *how much* the claim is worth." *OPEIU*, 27 F.3d at 602. The rule requiring reasonable certainty in damages forbids uncertainty only as to the *fact* of damages, however, not uncertainty as to their amount. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). Meritor did not have to pay severance benefits to the petitioners until they were terminated for economic reasons, but that protection had an immediate value in light of the proliferation of corporate reductions and the substantial diminution in Meritor's operations. See *OPEIU*, 27 F.3d at 602; App, *infra*, 51a n.1; *Campbell* C.A. App. 379a. It is true that Meritor *could* have terminated the Separation Plan before any of the petitioners were able to take advantage of it. Here, however, just as in *OPEIU*, "there is no question * * * that the agreement was in force when the FDIC repudiated it." 27 F.3d at 602 n.2.

There is another reason that the petitioners' rights to severance payments had accrued sufficiently at the time of insolvency to support a recovery of damages. The D.C. Circuit recognized a close analogy between an employer's

undertaking an obligation to make severance payments and a bank's issuing a standby letter of credit. See *OPEIU*, 27 F.3d at 602. The holder of a standby letter of credit is entitled to payment of its face value only if a third party defaults on an obligation to the holder. Likewise, a severance pay plan obliges a bank to pay on the occurrence of a particular event. Yet the receiver for a failed bank is liable for a standby letter of credit even if the third party does not default—and thus does not trigger the liability—until after the insolvency. *Citizens Bank*, 946 F.2d at 415. There is no convincing reason why a receiver should not also be liable for severance payments that are triggered at or after insolvency.

3. The plain language of Section 1821(e)(3) reinforces the conclusion that repudiated severance payments are recoverable as damages. The adjectives "actual," "direct," and "compensatory" have accepted meanings that do not exclude recovery for a breach of a covenant to pay severance benefits.

The terms "actual damages" and "compensatory damages" are synonymous, *e.g.*, *Birdsall* v. *Coolidge*, 93 U.S. (3 Otto) 64, 64 (O.T. 1876), and generally include all damages apart from punitive or exemplary damages. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1892); see also *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252, 260 (1964); 25 C.J.S. *Damages* § 2, at 615-617; C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77, at 275 (1935). The specific exclusion of punitive and exemplary damages in Section 1821(e)(3)(B) accords with this view.

The limitation to "actual" damages also serves to exclude liquidated damages, *Chicago, Burlington & Quincy R.R.* v. *Cram*, 228 U.S. 70, 83-84 (1913), and nominal damages, *Farrar* v. *Hobby*, 113 S. Ct. 566, 573 (1993), and in addition may exclude damages the *fact* of which is speculative, such as the "damages for lost profits or opportunity"

explicitly excluded in Section 1821(e)(3)(B) and discussed above. Cf. *Memphis Community School District* v. *Stachura*, 477 U.S. 299, 308 (1988). Finally, the modifier "direct" most naturally excludes the consequential damages that in some circumstances may be recovered under a contract. *E.g.*, *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 533 n.25 (1983) (citing *Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854)); *Meyer* v. *City of Richmond*, 172 U.S. 82, 94 (1898) (distinguishing between "direct" and "consequential" damages).

In sum, then, "actual direct compensatory damages" are contract damages in the traditional sense, with clear rules against the more speculative types of damages. A plaintiff whose recovery is limited by Section 1821(e) may seek only "the amount that would have been received, if the contract had been kept." *Benjamin* v. *Hillard*, 64 U.S. (23 How.) 149, 167 (1860). If Meritor's contract to make severance payments "had been kept," the petitioners "would have * * * received" an amount calculated according to their salary and length of service at the time they were terminated.

The damages resulting from a breach of an obligation to pay severance payments thus fall clearly on the "actual direct compensatory" side of the statutory dividing line. Those damages do no more than compensate for the actual payments to which the petitioners were entitled. Damages for the repudiated, past-due payments are the actual and direct result of the breach of a covenant to pay severance benefits—no more and no less.

II. THIS COURT SHOULD REVIEW THE THIRD CIRCUIT'S ERRONEOUS REFUSAL, CONTRARY TO *CURTISS-WRIGHT*, TO CONDUCT A "FACT-INTENSIVE INQUIRY" INTO THE PROPRIETY OF THE FDIC'S PROCEDURE FOR TERMINATING THE INSURANCE PLANS

This Court recently made clear that, even where an employer has set forth an employee benefit plan amendment procedure that is valid under ERISA Section 402(b)(3), a court faced with a challenge to a plan amendment must conduct a "fact-intensive inquiry" into the employer's actual compliance with the amendment procedure in making the change to the plan. *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1231 (1995). As this Court recognized, "one of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time," a goal that is served by the procedural requirements that encourage and justify "reliance on written plan documents," and by the enforceable obligation of the plan sponsor to comply with the procedures set forth in those documents. *Id.* at 1230-1231. The court below correctly held that the requirements of Section 402(b)(3) apply to terminations of plans as well as to amendments of continuing plans. App., *infra*, 25a. See also *Ackerman* v. *Warnaco, Inc.*, 55 F.3d 117, 121-122 (3d Cir. 1995).[7] The court also recognized that the controlling question was "what 'procedure' the FDIC must follow when it is appointed receiver for Meritor and it terminates an employee welfare benefit plan" based on a valid amendment procedure clause. App., *infra*, 27a.

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[7] This threshold determination conflicts with the holding of the Eleventh Circuit in *Aldridge* v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*, 40 F.3d 1202, 1210 (1994)—another reason why this Court should review the scope of the "fact-intensive inquiry" necessary under *Curtiss-Wright*.

The court went no further, however. Ignoring this Court's clear instruction in *Curtiss-Wright* that the proper inquiry must address "what persons or committees * * * possessed plan amendment authority, either by express authority or impliedly, and whether those persons or committees actually approved" any changes to a plan (115 S. Ct. at 1231), the court abdicated that responsibility in its haste to grant summary judgment to the FDIC on a ground that was not briefed and on a record that was almost entirely undeveloped. The court of appeals admitted that "the appropriate analog within the FDIC to Meritor's Board of Directors is not immediately apparent." App., *infra*, 27a. But rather than conduct a "fact-intensive inquiry"—or remand for factual development of the issue—the court granted summary judgment to the FDIC based solely on the principle that "an official receiver has great discretion in taking action that would previously have been handled through the normal method of corporate governance," and on the fact that the petitioners received mailings from "the FDIC" informing them of the plan terminations. *Ibid.* Although the Third Circuit might prefer not "to require further investigation into the methods by which the FDIC makes its decisions" (*ibid.*), the clear instructions of this Court compel that investigation. Employees do not lose the protections of ERISA simply because the enforcement of the law may require greater-than-usual judicial effort.

The appropriate level of judicial scrutiny of the FDIC's termination of failed banks' employee benefit plans presents an issue of recurring importance. Bank employees routinely have employer-provided health insurance and benefit from other employee welfare plans. Moreover, the issue presented in this case sweeps beyond the significant relationship between FIRREA and ERISA. The cursory, hands-off review afforded by the court below essentially nullified this Court's detailed instructions in *Curtiss-Wright*, and contrasts sharply with the thorough inquiry conducted by the Second

Circuit in *Algie* v. *RCA Global Communications, Inc.*, 60 F.3d 956 (2d Cir. 1995) (Newman, C.J.) (finding that benefit plan was not effectively terminated after sale of corporation); see also *Mohalley* v. *Kendall Health Care Products Co.*, ___ F. Supp. ___, 1995 WL 603277, at *7-*8 (D. Ga. Oct. 11, 1995) (nullifying purported amendment that was not "properly adopted"). Cf. *Heath* v. *Varity Corp.*, ___ F.3d ___, 1995 WL 704221, at *3 (7th Cir. Nov. 30, 1995) (change to plan permitted only if "procedure laid out in the plan or proper under general corporate law" is used). This Court should grant certiorari on this issue and remand the case with instructions that the lower courts undertake the "fact-intensive inquiry" mandated in *Curtiss-Wright* to evaluate the legal sufficiency of the FDIC's purported termination of the Insurance Plans.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1995

APPENDICES

APPENDICES

APPENDIX A

John T. HENNESSY; Michael B. High; William A. Bracken; Larry Gibson; Martha C. Hitchcock; Laurence A. Liss; Ken Mancini; George S. Rapp; Roberta Griffin Torian; Frank J. Soriero

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Meritor Savings Bank.

Thomas CALLAHAN

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Meritor Savings Bank. Appeal of John T. HENNESSY, Roberta Griffin Torian, Michael B. High, William Bracken, Laurence Liss, Marty Hitchcock, George S. Rapp, Kenneth R. Mancini, Lawrence J. Gibson, Frank J. Soriero and Thomas Callahan, Appellants.

David A. CAMPBELL, Jr.; Robert F. Hanna; Leslie Voth; Helen T. DeMarco, individually, and Robert F. Hanna; Helen T. Demarco, on behalf of themselves and all others similarly situated (Separation Plan Class), and David A. Campbell, Jr., on behalf of himself and all others similarly situated (Retiree Health Class), and David A. Campbell, Jr.; Robert F. Hanna, on behalf of themselves and all others similarly situated (Life Insurance Class)

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Meritor Savings Bank. Appeal of David A. CAMPBELL, Jr., Robert F. Hanna, Helen T. DeMarco and Leslie Voth, Appellants.

Joseph A. ADOLF, Laurence J. Arnold, Christian F. Aurig, George W. Barber, Linda C. Barch, Richard F. Bate, Owen

J. Behen, Lauren Bethea, Elizabeth L. Blankenhorn, Anne Marie Boback, Susan M. Brown, John J. Buczek, George S. Bunting, Mary Ann C. Burch, Edith Burkeitt, Thomas P. Callahan, David A. Campbell, Jr., Karla J. Carney, John M. Casamento, Jr., William J. Cathcart, Lisa Cavalli, Nancy L. Ceffaratti, Joseph D. Cellucci, Esther Cerbo, Carole A. Circucci, Anthony R. Coogan, Larry A. Cook, Samuel J. Cook, Wallace P. Cooney, Paul L. Coppola, Lorene C. Coquillette, Betty R. Corley, Harriet S. Corley, Joan T. Corson, David E. Coverdale, Mary C. Craige, Loius T. Cullen, John F. Culp, Edward D. Custer, Michael Czincila, Joan E. Debes, Irene V. Delizzio, Gail L. Delviscio, Harold L. Dempsey, Harold C. Dengel, Debra Anne Denight, Beatrice L. Desher, Joseph H. Devore, Jr., Anna S. Difelice, Mario Difelice, Mary Ann Digregorio, Leonid A. Dobrinin, Sarah S. Doody, Joseph M. Duffy, Leonard T. Ebert, John A. Fatula, Charles J. Ferrie, George W. Fetters, Jr., Lore L. Fisher, John P. Fogarty, Cynthia M. Ford, Doris Gagliardi, Barbara A. Gibson, Frances J. Gillen, William R. Goettle, Charles W. Gray, III, Eugene A. Heiwig, William H. Hilliard, William H.H. Hsu, Stanley E. Hunt, Charles C. Jones, Thomas C. Keiser, Kathleen F. Kelly, Lynn M. Kelly, Ethel S. Keowen, John Andrew Kinnerman, Philip W. Klinger, C. Andrew Krepps, Jr., John David Lambert, Michael G. Lewis, Patricia Leuthy, Salvatore Lizzio, Aldo S. Lombardi, Elisabeth W. Lord, Kathleen Lynch, E. David MacNally, William C. MacNeill, Jr., Frank Joseph Marullo, Edward M. Mason, Jr., Thomas G. Marvel, Ruth A. McAllister, Joseph F. McCole, Christine D. McCormick, Philip J. McCormick, Janet B. McCourt, David C. Melnicoff, Freda I. Millar, Anthony M. Mingarino, Joseph J. Moffa, Linda Lee Montana, Barbara L. Morgan, Marion D. Morgan, Leonard V. Morris, David D. Morrison, Mary T. Murphy, Anthony J. Nocella, William A. Norris, III, Martha K. Nylund, Mary E. Orr, John T. Osmian, Charles E. Padgett, Patricia Pawling, Howard F. Pearce, Catherine P. Piccone, Peter P. Pryzbylkowski, Darlene E. Purugganan, Elizabeth L.

Rafetto, Edward W. Rapp, Luba K. Reilly, Louise M. Reitano, Antoinette D. Rendino, Ms. Jamie Rindock, Jean Davis Robinson, Richard Rogers, Diane S. Rohr, Herbert A. Roth, Anthony J. Santilli, Jr., Kathleen M. Sawchynsky, Ruth C. Schmidt, Michael F. Scutti, Martin Selgrath, John W. Semple, Joseph F. Slane, Robert A. Smalley, Elizabeth K. Sonneborn, Fred B. Staas, Walter R. Staples, Robert C. Steinman, Arthur W. Stettler, Jean J. Stubbs, Anthony Tabasco, Robert B. Taylor, Annita L. Tedesco, Kenneth C. Thomas, Patricia E. Thompson, Dianne T. Tindall, James M. Toolan, Morris Varano, Stanley J. Verbeek, Donna Volz, Leslie C. Voth, Theresa M. Webb, Cynthia West, Robert B. Whitelaw, Alton T. Winner, Jr., Anne M. Wise, Verdella Wright, Anthony J. Zongaro and Lina G. Zanoni, Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Meritor Savings Bank.

Nos. 94-1857, 94-1933 and 94-1934.

United States Court of Appeals,
Third Circuit.
Argued May 16, 1995.
Decided June 29, 1995.

Alice W. Ballard (argued), Samuel & Ballard, Philadelphia, PA, for appellants in No. 94-1857.

Harry C. Barbin (argued), Barbin, Lauffer & O'Connell, Rockledge, PA, for appellants in No. 94-1933.

Harry C. Barbin (argued), William M. O'Connell, Barbin, Lauffer & O'Connell, Rockledge, PA, for appellants in No. 94-1934.

Jaclyn C. Taner (argued), F.D.I.C., Washington, DC, for appellee F.D.I.C. as Receiver for Meritor Sav. Bank.

Before: COWEN, LEWIS and GARTH, Circuit Judges.

OPINION OF THE COURT

COWEN, Circuit Judge:

Plaintiffs in these related cases, former employees and managers of Meritor Savings Bank, appeal from three orders of the district court that granted summary judgment in favor of the defendant, the Federal Deposit Insurance Corporation ("FDIC"), on their claims to recover severance pay, medical benefits, and life insurance benefits pursuant to the terms of their employee welfare benefit plans. The issues raised in these appeals are whether the district court erred in determining that: (1) the FDIC's takeover and sale of Meritor was not a reorganization for purposes of the plaintiffs' separation pay plan; (2) the discharge of Meritor employees did not constitute "job elimination" or "lack of work" triggering severance payments; (3) the plaintiffs had no vested right to severance pay; (4) the FDIC properly exercised its repudiation powers; (5) the plaintiffs did not incur "actual direct compensatory damages" as provided in 12 U.S.C. § 1821(e)(3); (6) the FDIC properly terminated life and health insurance benefits pursuant to the termination provisions in these employee welfare benefit plans; (7) the FDIC was not liable for a statutory penalty under 29 U.S.C. § 1132(c)(1) as a result of its failure to respond in a timely manner to plaintiffs' request for plan documents; and (8) the certification of three plaintiff classes was inappropriate. Because we conclude that the district court did not err in granting summary judgment to the FDIC on plaintiffs' claims for separation pay, health insurance benefits, and life insurance benefits, we will affirm the orders of the district court. Further, because we conclude that the district court did not abuse its discretion in finding that the FDIC is not liable for the statutory penalty prescribed by 29 U.S.C. § 1132(c), we will affirm the order of the district court pertaining to this issue. Finally, because of our conclusion on the merits, that the district court did not err in granting summary judgment for the FDIC, we need not reach the class certification issues.

I. FACTS & PROCEDURAL HISTORY

On December 11, 1992, the Secretary of Banking of the Commonwealth of Pennsylvania issued an order declaring Meritor Savings Bank ("Meritor") insolvent and directing that the bank be closed. On the same day, the FDIC was appointed as receiver for the insolvent bank. As receiver, the FDIC executed a Purchase and Assumption Agreement with Mellon Bank ("Mellon") transferring a portion of Meritor's assets and liabilities to Mellon. The FDIC retained the liabilities not assumed by Mellon, along with the unpurchased Meritor assets, which the FDIC proceeded to liquidate for the benefit of Meritor's approved creditors.

The record demonstrates that until the Secretary of Banking declared the bank insolvent, Meritor maintained a separation pay plan ("SPP"), a retiree health insurance plan (the Meritor Medical Plan 65 Special Option or "65 Special"), and a retiree life insurance plan (the Meritor Group Life Insurance Plan or "MGLIP").[1] Under the SPP, eligible employees were entitled to severance pay based on their years of service and salary, up to a maximum benefit of twenty-six weeks. Benefits were payable for involuntary termination due to "lack of work, job elimination, reorganization or reduction-in-force." Campbell App. at 139a. No benefits would be paid if separation resulted from sale or disposition of a portion of Meritor's assets and the employee was employed by the successor entity. *Id.*

The SPP was "unfunded," meaning all benefits were paid from the general assets of Meritor. *Id.* at 141a. Meritor

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[1] The parties stipulated to the material facts in these cases. Statement of Undisputed Facts, Hennessy App. at 187-95; Joint Statement of Undisputed and Disputed Facts Regarding Motions for Summary Judgment, Campbell App. at 403a-70a; Joint Statement and Joint Supplemental Statement of Disputed and Undisputed Facts, Adolph App. at 367a-437a.

retained sole authority to determine whether a separation entitled an employee to benefits. *Id.* Moreover, Meritor expressly reserved the right to modify or discontinue the SPP in whole or in part at any time. *Id.* at 137a.

Under the 65 Special, Meritor provided group health insurance coverage for its retirees. *Id.* at 406a. The 65 Special was a self-insured plan that qualified as an employee welfare benefit plan under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 ("ERISA"). The MGLIP, also an employee welfare benefit plan under ERISA, provided retirees with death benefit coverage equal to the lesser of $50,000 or 25% of the amount of death benefit coverage for which they were insured immediately prior to retirement. *Id.* at 405a-06a.

Meritor explicitly reserved the right to terminate the 65 Special and the MGLIP at any time. The health plan provided:

> Meritor intends the plan to be permanent, but since future conditions affecting your employer cannot be anticipated or foreseen, Meritor reserves the right to amend, modify or terminate the plan at any time, which may result in the termination or modification of your coverage. Expenses incurred prior to the plan termination will be paid as provided under the terms of the plan prior to its termination.

Id. at 165a (emphasis omitted). The life insurance plan provided:

> Meritor reserves the right to terminate the group life insurance policy for its employees and retirees at any time, if Meritor determines that such termination is in its best interests. If Meritor terminates its group life insurance policy, employees and retirees who die after the effective date of the termination ... will not have any life insurance.

Id. at 152a.

On the day the Secretary declared Meritor insolvent, a meeting was held to discuss the status of Meritor's employees. At that meeting, Jack Goodner, the FDIC's closing manager, made a brief presentation. When he finished his remarks, an employee asked him whether severance benefits would be paid. Goodner thought not, but was not sure. After looking towards two other FDIC officials for guidance, Goodner responded "no." At the close of business on December 11, 1992, the former Meritor employees became employees of Keytech Resources, Inc., a firm established to provide staffing for the former Meritor offices purchased by Mellon. Mellon paid severance benefits to the employees who were subsequently laid off based on their years of service to Meritor, up to a maximum of four weeks salary.

On the Monday following the events of Friday, December 11, 1992, the former branches of Meritor opened for business as usual under the name of Mellon-PSFS without interruption of business to regular customers. The FDIC subsequently repudiated the SPP pursuant to its powers under 12 U.S.C. § 1821(e). The FDIC did not repudiate either the 65 Special or the MGLIP plans. Instead, the FDIC sent letters to the former employees and retirees of Meritor notifying them that their health and life insurance plans were terminated effective December 31, 1992 pursuant to the terms of each plan.[2] Those letters advised the employees about the availability of FDIC-sponsored continuing medical coverage, and also provided specific instructions for filing claims for benefits under the FDIC's statutory claims process, alerting

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[2] Consistent with the above facts, when we use the term "repudiation," we are referring to the statutory power of a receiver under 12 U.S.C. § 1821(e) to refuse to recognize a contract. "Termination," by contrast, refers to the discontinuing of a plan pursuant to the plan's own terms.

the employees and retirees to a March 19, 1993 bar date for filing claims against the assets of the receivership.

A. *The Hennessy Plaintiffs*

The Hennessy plaintiffs are former managers of Meritor. They filed suit in the Eastern District of Pennsylvania alleging the right to recover severance pay pursuant to the terms of the SPP. In support of their claim, they rely on the above-stated facts and the fact that, prior to the FDIC's takeover of Meritor, each of them received a letter from Meritor's Chairman, Roger Hillas, stating:

> Meritor senior management is acutely aware that [it] is essential to retain motivated employees such as you in key positions.
>
> As evidence of this awareness, Meritor is extending the severance benefit provided to you under the Separation Pay Program to a total of 52 weeks pay. This enhanced benefit will be payable under the same terms and conditions as provided for in the Separation Pay Program if you are separated from employment by Meritor anytime on or before December 31, 1992.

Letter from Hillas to John Hennessy (October 3, 1990); Hennessy App. at 68. The Hennessy plaintiffs argued before the district court that their severance rights under the SPP were activated when "they were terminated as part of a reorganization." *Hennessy* v. *FDIC*, 858 F. Supp. 483, 487 (E.D. Pa. 1994).

The district court rejected the Hennessy plaintiffs' argument. The court explained that the FDIC sold Meritor to Mellon and was in the process of liquidating the rest of Meritor's assets. *Id.* The court reasoned that because the FDIC was involved with the termination of Meritor, rather than the continuation of its business, there was no reorganization. *Id.*

In the alternative, the Hennessy plaintiffs argued before the district court that given the FDIC's repudiation of the SPP, the plaintiffs should be able to recover severance pay pursuant to 12 U.S.C. § 1821(e)(3) which provides for compensation for actual direct compensatory damages attributable to a repudiation. *Id.* at 488-89. The district court disagreed. Relying on the decision of the Court of Appeals for the First Circuit in *Howell* v. *FDIC*, 986 F.2d 569 (1st Cir.1993), the district court determined that severance payments are not actual direct compensatory damages under § 1821(e)(3). *Id.* at 489. Accordingly, the district court granted summary judgment in favor of the FDIC. *Id.* at 485. This appeal followed.

B. *The Campbell Plaintiffs*

The Campbell plaintiffs include: (1) David Campbell, Jr., an employee who retired from Meritor effective December 1, 1987; (2) Robert Hanna, Helen DeMarco, and Leslie Voth, employees who were employed by Meritor on December 11, 1992; and (3) potential plaintiff classes comprised of the above named plaintiffs and those similarly situated. The Campbell plaintiffs filed claims for benefits with the FDIC. The FDIC, however, rejected these claims.

Subsequent to the FDIC's denial of their claims, the Campbell plaintiffs filed suit in the United States District Court for the Eastern District of Pennsylvania. In their complaint, plaintiffs Hanna and DeMarco sought severance payment pursuant to the SPP. Plaintiff Campbell sought a declaration that he and other similarly situated persons are entitled to health insurance coverage under the 65 Special. Campbell also sought reimbursement with interest for health insurance premiums paid since December 11, 1992. In addition to these claims, plaintiffs Campbell and Hanna sought a declaration that they and other similarly situated persons are entitled to life insurance under the MGLIP. They also sought reimbursement with interest for life insurance premiums paid since December 11, 1992. Finally, plaintiffs Campbell,

Hanna, Voth and DeMarco sought a monetary penalty under ERISA for the FDIC's failure to provide in a timely manner information requested by their counsel.[3]

The district court denied Hanna and DeMarco's claims for severance pay under the SPP for the reasons set forth in its decision in *Hennessy*. *Campbell* v. *FDIC*, No. CIV.A. 93-3969, 1994 WL 475067, at *4 (E.D. Pa. Aug. 29, 1994). In addition, the court found that it did not have jurisdiction to hear the claims brought by Campbell or Voth because these claims were filed prematurely.[4] *Id.* Nevertheless, the court concluded that even if it had jurisdiction to hear Campbell's claims for health and life insurance benefits, these claims would fail because the FDIC terminated both the 65 Special and the MGLIP pursuant to its contractual rights. *Id.* Finally, the district court granted summary judgment in favor of the FDIC on the plaintiffs' claims for a statutory penalty because it concluded that: (1) the statutory penalty should not apply to the FDIC, an agency of the federal government; or (2) even if the statutory requirement does apply to the FDIC, the court would exercise its discretion under 29 U.S.C. § 1132(c) and award no penalty in this case. *Id.* at *7.

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[3] Plaintiffs' counsel sent an ERISA document request to the FDIC on March 16, 1993. The FDIC did not respond to the ERISA document request until September 21, 1993, 189 days after the initial request.

[4] The court concluded that Campbell's and Voth's claims were premature because these plaintiffs did not wait the requisite 180 days after filing their claims with the FDIC before filing their actions in district court. *Campbell*, 1994 WL 475067, at *4. The court noted, however, that Campbell and Voth were added as individual plaintiffs in the Adolph case by the filing of the First Amended Complaint in that case and thus these plaintiffs asserted a timely filing in Adolph. *Id.* at *7 n.7.

With respect to the potential class claims, the district court denied plaintiffs' motion to certify a separation pay plan class, a retiree health class, and a life insurance class. *Campbell* v. *FDIC*, No. 93-3969 (E.D. Pa. June 30, 1994) (order denying class certification). The court determined that the plaintiffs could not satisfy all four of the threshold requirements of Rule 23(a) of the Federal Rules of Civil Procedure for certifying a plaintiff class. *Id.* at 5, 7, 8. In addition, the district court found that class certification under Rule 23(b)(1) or Rule 23(b)(2) would be inappropriate. *Id.* at 9. This appeal followed.

C. *The Adolph Plaintiffs*

The Adolph plaintiffs are a group of 161 former Meritor employees and retirees.[5] In their complaint, also filed in the United States District Court for the Eastern District of Pennsylvania, the employee plaintiffs challenged the repudiation of the SPP by the FDIC. The retiree plaintiffs challenged the termination of their medical benefits under the 65 Special. In addition, both the employee and retiree plaintiffs challenged the termination of the MGLIP. The FDIC and the Adolph plaintiffs filed motions for summary judgment on July 26, 1994. The district court granted summary judgment for the FDIC for the reasons detailed in *Hennessy* and *Campbell*. *Adolph v. FDIC*, No. 94-1499 (E.D. Pa. Aug. 29, 1994) (order granting summary judgment). This appeal followed.

II. JURISDICTION

These cases commenced under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") and ERISA. The district court's jurisdiction was predicated upon 28 U.S.C. § 1331. We have jurisdiction over the instant appeals pursuant to 28 U.S.C. § 1291. We

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[5] On July 22, 1994 the district court entered an order granting the plaintiffs' unopposed motion to amend the complaint in this matter to add David Campbell and Leslie Voth as plaintiffs.

exercise plenary review over a grant of summary judgment. Because the material facts in this matter are not in dispute, we review only for errors of law. As to the Campbell plaintiffs' argument that an ERISA penalty should be assessed pursuant to 29 U.S.C. § 1132(c)(1), our review is for abuse of discretion.

III. SEVERANCE PAY

A. Was there a Reorganization?

The Hennessy plaintiffs' first contention is that Meritor was "reorganized," triggering a right to severance payments under the terms of the SPP. According to these plaintiffs, Mellon Bank acquired Meritor as a going concern following the FDIC's takeover of Meritor. The Hennessy plaintiffs point out that Meritor's offices opened for business as usual on the next business day after the takeover under the trademark "Mellon-PSFS." They assert that because Meritor continued as a going concern without interruption of business, they have a right to severance payments under the terms of the SPP.

We are unpersuaded by this argument. The written terms of the SPP provide that:

> If the Employee is involuntarily terminated for organizational reasons associated with lack of work, job elimination, reorganization, or reduction in force ... he/she will be eligible to receive bi-weekly separation payments and benefit continuation as outlined in Section IV of the Plan Document.

Meritor Separation Pay Program (effective November 1, 1989); Campbell App. at 129a (emphasis added). The district court determined that both the facts and the law in this case did not support the conclusion that the Hennessy plaintiffs were terminated as part of a reorganization. *Hennessy*, 858 F.Supp. at 487. It reasoned that the FDIC's takeover and sale of a bank's assets constituted a termination of the bank's

business, not a continuation of this business. *Id.* We agree with the determination of the district court.

A receiver, unlike a conservator, does not have as its purpose the preservation of an institution as a going concern. *Resolution Trust Corp.* v. *CedarMinn Bldg. Ltd. Partnership*, 956 F.2d 1446, 1454 (8th Cir.), *cert. denied*, --- U.S. ----, 113 S.Ct. 94, 121 L.Ed.2d 56 (1992). Receivers have the power to liquidate and wind up the affairs of an institution. *Id.* (citing *FDIC* v. *Grella*, 553 F.2d 258, 261 (2d Cir. 1977)). As the Court of Appeals for the Eighth Circuit has recognized, this distinction was emphasized in the Conference Report accompanying FIRREA, which stated:

> The title ... distinguishes between the powers of a conservator and receiver, making clear that a conservator operates or disposes of an institution as a going concern while a receiver has the power to liquidate and wind up the affairs of an institution.

Id. (quoting H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 396 (1989), U.S.C.C.A.N. 1989, pp. 86, 435).

The Secretary of Banking for the Commonwealth of Pennsylvania closed Meritor Savings Bank. The FDIC was appointed receiver and it sold some of Meritor's assets to Mellon. As part of this transaction, Mellon agreed to assume some of Meritor's liabilities. The FDIC proceeded to liquidate the remaining assets of Meritor for the benefit of Meritor's creditors. These actions are commensurate with the winding up of a failed bank's affairs and the proper function of a receiver. To suggest that these actions constituted a reorganization of Meritor is to turn a blind eye to the dispositive facts. We therefore cannot conclude that the district court erred in its determination that Meritor did not undergo a reorganization that would trigger plaintiffs' rights to severance pay.

B. "Job Elimination" or "Lack of Work"

Rather than arguing that Meritor was reorganized, the Adolph and Campbell plaintiffs suggest that under the terms of the SPP, "job elimination" or "lack of work" triggered the receiver's obligation to pay severance benefits. According to these plaintiffs, the district court failed to adequately consider this argument when it simply relied on its discussion in *Hennessy* to grant summary judgment in favor of the FDIC in the *Campbell* and *Adolph* cases.[6] The Adolph and Campbell plaintiffs assert that because the FDIC, as receiver, stands in the shoes of Meritor, it must provide separation benefits pursuant to the written terms of the SPP.

This argument also misses the mark. As stated above, the written terms of the SPP provide:

> If the Employee is involuntarily terminated for organizational reasons associated with *lack of work, job elimination*, reorganization, or reduction in force ... he/she will be eligible to receive bi-weekly separation payments and benefit continuation as outlined in Section IV of the Plan Document.

Meritor Separation Pay Program (effective November 1, 1989); Campbell App. 129a (emphasis added). Job elimination, however, is defined by the plan to be if "as a result of a reorganization, changing business needs, or the sale, closure or relocation of an office, a specific position is determined to be unnecessary to the company for an indefinite period of time." *Id.* at 128a. The Secretary of Banking's shutdown of Meritor and the appointment of the FDIC as receiver was not "reorganization, changing business needs, or the sale, closure or relocation of an office." It was the shutdown of the entire bank. Further, no specific position was "determined to be unnecessary to the company for an indefinite period of time."

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[6] The district court's discussion in *Hennessy* did not specifically address this argument.

Rather, Meritor ceased to exist, and the employment of all employees (not specific positions) was terminated permanently. We therefore cannot conclude that "job elimination" triggered a right to severance pay.

Similarly, we cannot conclude that a "lack of work," as defined by the plan, triggered the right to severance benefits. Lack of work is defined by the plan to be if "as a result of a decrease in volume of work to be done, a position is temporarily not needed." *Id.* at 128a (emphasis added). The facts of this case do not support the view that a position was "temporarily not needed." The Secretary of Banking closed the entire bank and declared Meritor insolvent. We therefore fail to see how the Campbell and Adolph plaintiffs have demonstrated a "lack of work" as the plan defines that phrase. Accordingly, we are unpersuaded that the district court erred in failing to find this argument a sufficient basis upon which to ground a claim for severance benefits.[7]

C. Did plaintiffs' right to severance pay vest?

Using slightly different approaches, the Hennessy plaintiffs, and the Campbell and Adolph plaintiffs, next argue that their rights to severance pay were "fixed and unconditional" when the receiver was appointed. Based on certain language in the Court of Appeals for the First Circuit's

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[7] The Hennessy plaintiffs did not rely on "job elimination" or "lack of work" as a basis for recovery in their briefs before this Court. At oral argument, however, counsel for the Hennessy plaintiffs stated that she believed that "job elimination" or "lack of work" would be an alternative grounds of recovery for her clients. Further, she stated that the plan document containing the definitions of "job elimination" and "lack of work" received by the Campbell and Adolph plaintiffs was not received by the Hennessy plaintiffs. While the Hennessy plaintiffs' argument along these lines raises certain questions about which plan documents are applicable to them, we need not decide these questions because of our determination, see infra part III.D., that the FDIC repudiated the SPP.

opinion in *Kennedy* v. *Boston-Continental National Bank*, 84 F.2d 592 (1st Cir. 1936), the Hennessy plaintiffs argue that their rights to severance benefits vested *on the day that Meritor closed its doors and went into receivership*. The Campbell and Adolph plaintiffs, by contrast, assert that the Meritor employees had fixed, enforceable contract rights to severance pay *throughout the term of their employment* as the result of their total compensation package. According to the Campbell and Adolph plaintiffs, the only contingent aspect of their right to severance pay was the amount of the benefits to be paid, an amount that was tied to each employee's salary and years of service. These plaintiffs cite *Citizens State Bank of Lometa* v. *FDIC.*, 946 F.2d 408, 415 (5th Cir. 1991), and that case's analysis of a standby letter of credit, to support their argument.

We find these arguments unconvincing. The rights and liabilities of a bank and the bank's debtors and creditors are fixed as of the date of the declaration of a bank's insolvency. *American Nat'l Bank of Jacksonville* v. *FDIC*, 710 F.2d 1528, 1540 (11th Cir.1983) (citing *First Empire Bank* v. *FDIC*, 572 F.2d 1361, 1367-68 (9th Cir.), cert. denied, 439 U.S. 919, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978)); *FDIC* v. *Grella*, 553 F.2d 258, 262 (2d Cir. 1977); *Kennedy*, 84 F.2d at 597). To establish a claim against an insolvent bank in receivership, the liability of the bank must have accrued and become unconditionally fixed on or before the time it is declared insolvent. *Kennedy*, 84 F.2d at 597 (citations omitted). As the Court of Appeals for the First Circuit has stated:

> The amount of a claim may be later established, but it must be the amount due and owing at the time of the declaration of insolvency.... If nothing is due at the time of insolvency, the claim should not be allowed....

Id.; *see also Dababneh* v. *FDIC*, 971 F.2d 428, 434 (10th Cir. 1992) (courts analyze "provability" of claims and creditors possess "provable" claims only if claims are "in

existence before insolvency") (quoting *FDIC* v. *Liberty Nat'l Bank*, 806 F.2d 961, 965 (10th Cir. 1986)).

The language that the Hennessy plaintiffs cite in *Kennedy* is not to the contrary. To support their argument, the Hennessy plaintiffs point to language in Kennedy that states:

> Had the lease contained a covenant that insolvency shall be breach of the lease and thereupon, without any further action by the lessor, the lease shall terminate and the lessor shall be entitled forthwith to damages measured as provided in the covenant of the lease for liquidated damages, then, on the declaration of insolvency, no doubt a claim would arise and be matured by the agreement for liquidated damages ... so that the claim would be provable in bankruptcy.

Kennedy, 84 F.2d at 597 (citations omitted). Aside from the fact that the Hennessy plaintiffs' position ignores the holding of *Kennedy*—that the claim for failure to rent in that case was too contingent and uncertain to support liability—these plaintiffs have made no showing that insolvency itself triggered their rights under the SPP. The terms of the SPP do not provide that a declaration of insolvency triggers payment of severance benefits. Accordingly, their right to severance benefits was still contingent at the time of the appointment of the receiver.

The Campbell and Adolph plaintiffs' right to severance pay was likewise contingent, and their reliance on *Citizens State Bank of Lometa* is unavailing. In *Lometa*, the Court of Appeals for the Fifth Circuit held that claims that "originated" from standby letters of credit issued before the bank became insolvent passed the "provability test" even though the triggering event obligating the bank to pay did not occur until after the bank became insolvent. *Lometa*, 946 F.2d at 415. The court in *Lometa*, however, explained that standby letters of credit are not contingent liabilities; they are loans. *Id.* at 414. Therefore, such letters are not directly compara-

ble to a severance pay plan under which no vested benefits accrue until a contingency is fulfilled. Accordingly, we remain unconvinced that the plaintiffs had a vested right to benefits prior to, or at the time of, the appointment of the receiver.

D. Repudiation

Having determined that there was no event that triggered the payment of severance benefits, it would ordinarily be unnecessary to dispose of the other issues raised by the parties regarding their entitlement to severance pay, *i.e.*, repudiation and whether the failure to pay severance benefits constituted actual direct compensatory damages under FIRREA. However, the parties have forcefully argued their positions regarding the various "triggering" provisions, and have at least implied that they are susceptible to more than one reasonable interpretation. We would normally commit the task of construing ambiguous contract terms to the fact finder after extrinsic evidence has been adduced. We do not do so here because even if we were to assume a triggering event had occurred, we would nonetheless affirm the district court's grant of summary judgment in favor of the FDIC because the FDIC repudiated the SPP pursuant to its statutory authority under 12 U.S.C. § 1821. See *PAAC* v. *Rizzo*, 502 F.2d 306, 308 n. 1 (3d Cir. 1974), cert. denied, 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975) (we can affirm the district court on any ground).

The Hennessy, Campbell, and Adolph plaintiffs all allege that following the FDIC's appointment as receiver, the FDIC did not properly repudiate the SPP pursuant to the statutory requirements found at 12 U.S.C. § 1821(e)(1). According to the plaintiffs, 12 U.S.C. § 1821(e)(1) requires the FDIC to make formal findings that the terms of the SPP were "burdensome" and that repudiation is necessary in order to "promote the orderly administration of the institution's affairs." The plaintiffs argue that the FDIC made no such formal findings in this case and therefore any repudiation of the SPP was

ineffective. Further, the Hennessy plaintiffs argue that the FDIC improperly relied on an undisclosed policy of denying all claims for severance benefits in repudiating the SPP.[8]

The provisions governing a receiver's authority to repudiate contracts can be found at 12 U.S.C. § 1821(e). Section 1821(e) states, in pertinent part:

---

[8] In addition to this procedural argument, the Hennessy plaintiffs suggest that the FDIC's repudiation power is limited to executory contracts. These plaintiffs cite *LaMagna* v. *FDIC*, 828 F.Supp. 1 (D.D.C.1993) in support of their position. In LaMagna, the district court determined that an employment agreement which provided for severance pay was nonexecutory once the employee had rendered his services by working for one year. *Id.* at 2-3. The court concluded that such nonexecutory contracts may not be repudiated by the FDIC pursuant to FIRREA. *Id.* We are unpersuaded by the district court's reasoning in *LaMagna*. The district court's conclusory holding that § 1821(e) does not permit the receiver to repudiate a "nonexecutory" contract lacks support in both the statutory language and the case law. As many courts have noted, the statute explicitly provides that a conservator or receiver "may disaffirm any contract or lease," not just executory contracts. *E.g.*, *Employees' Retirement System of Alabama* v. *Resolution Trust Corp.*, 840 F.Supp. 972, 984 (S.D.N.Y.1993) (quoting § 1821(e)(1)(A)) (emphasis in original). This provision is in sharp contrast to the Bankruptcy Code which specifically refers only to the trustee's power to reject executory contracts. *See Morton* v. *Arlington Heights Fed. Sav. & Loan Ass'n*, 836 F.Supp. 477, 481-82 (N.D.Ill.1993); *Employees' Retirement System of Alabama*, 840 F.Supp. at 984 (noting marked contrast with the Bankruptcy Code which gives a trustee in bankruptcy the power to "assume or reject any executory contract." (quoting 11 U.S.C. § 365(a))). Because Congress provided no such limitation here, we are unable to conclude that the FDIC's power of repudiation is limited only to executory contracts.

(1) Authority to repudiate contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease —

(A) to which the institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1) (Supp. V 1993). Section 1821(e) does not set forth a specific procedure for a receiver to follow in repudiating a contract. Indeed, section 1821(e) leaves the decision as to whether repudiation is "burdensome" and "necessary to promote the orderly administration of the institution" to the receiver's discretion so long as repudiation is accomplished within "a reasonable period" following the receiver's appointment. 12 U.S.C. § 1821(e)(2).

Courts have refused to read into this statutory language any requirement for formal findings in support of a decision to repudiate. In addressing this precise issue in a case involving a receiver's obligation to pay rent, the Court of Appeals for the Second Circuit recently stated:

> First, there is no requirement that the conservator or receiver make a formal finding that a lease or contract is burdensome. Second, it can hardly be said that it was not reasonable for the [receiver] to find that it would be burdensome for it to assume a $7 million obligation to pay rent on premises for which it no longer had use, at a time when the real estate market was declining. Third, whether the lease is burdensome is to be decided at the

discretion of the conservator or receiver. 12 U.S.C. § 1821(e)(1)(B).

1185 Avenue of the Americas Assocs. v. *Resolution Trust Corp.*, 22 F.3d 494, 498 (2d Cir. 1994). The court went on to uphold the district court's grant of summary judgment in favor of a receiver that claimed that it had repudiated a lease. *Id.*; *see also Morton*, 836 F.Supp. at 485 ("The statute does not require that the receiver give reasons for repudiating a contract...."); *Jenkins-Petre Partnership One* v. *Resolution Trust Corp.*, No. Civ.A. 91-A- 637, 1991 WL 160317, at *5 (D. Col. Aug. 13, 1991) ("The FIRREA statute does not provide that the [receiver] explain its actions or that a court may review the basis for that decision.").

We see no reason to depart from this line of cases. The claimants have failed to demonstrate that the SPP, which provided no benefit to the receivership, but which called for millions of dollars in payments, should not be considered "burdensome." In addition, we conclude that there is no basis in the statute or in the case law for requiring the FDIC, which has discretion in making the decision concerning whether to repudiate, to produce written findings.

Nor do we find merit in the Hennessy plaintiffs' argument that the FDIC's repudiation is invalid because it was carried out pursuant to an undisclosed policy. We fail to comprehend how a consistent denial of the same type of claim constitutes an abuse of the FDIC's discretion. If anything, such a longstanding policy demonstrates a conscious decision to promote uniform treatment of similar claims. Accordingly, we cannot conclude that the district court erred in determining that the FDIC's repudiation was not procedurally defective.

E. Actual Direct Compensatory Damages

The three sets of plaintiffs next argue that even if the FDIC did properly repudiate the SPP, they are entitled to severance benefits as actual direct compensatory damages under 12 U.S.C. § 1821(e)(3). The plaintiffs assert that

severance pay in the context of at will employment represents additional compensation for entering into such a relationship and is therefore a compensable loss if not paid. The plaintiffs rely on the decision of the Court of Appeals for the District of Columbia Circuit in *Office and Professional Employees Int'l Union, Local 2* v. *FDIC, as Receiver of Nat'l Bank of Washington* ("*NBW*") 27 F.3d 598 (D.C. Cir. 1994), to support their position.

While the question is close, we remain unconvinced by the plaintiffs' argument. FIRREA provides, in pertinent part, that:

> the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be—
>
> (i) limited to actual direct compensatory damages; and
>
> (ii) determined as of—
>
> (I) the date of the appointment of the conservator or receiver; ....

12 U.S.C. § 1821(e)(3)(A) (Supp. V 1993). The statute states, however, that the term "actual direct compensatory damages" does not include:

> (i) punitive or exemplary damages;
>
> (ii) damages for *lost profits or opportunity*; or
>
> (iii) damages for pain and suffering.

12 U.S.C. § 1821(e)(3)(B) (Supp. V 1993) (emphasis added). The courts are split over the proper interpretation of these provisions. The Court of Appeals for the First Circuit has determined that the phrase "actual direct compensatory damages," does not include severance payments stipulated in advance. *Howell* v. *FDIC*, 986 F.2d 569, 573 (1st Cir. 1993). According to that court, such payments are "at best an estimate of likely harm made at a time when only predic-

tion is possible" and are analogous to "liquidated damages." *Id.* That court reasoned that because those employees entitled to severance pay "may, or may not, have suffered injury," depending on the employment options they had in the past and the options available now, and because "[c]onceivably," such employees could have suffered "no damage at all," severance payments of this type do not fit within the language of the statute. *Id.*; see also *Resolution Trust Corp.* v. *Management, Inc.*, 25 F.3d 627, 632 (8th Cir. 1994) ("Neither severance fees nor future lost profits are compensable under FIRREA."); *Westport Bank & Trust Co.* v. *Geraghty*, 865 F.Supp. 83, 86 (D. Conn.1994) ("Courts have found that damages resulting from the repudiation of a severance package are not 'actual direct compensatory damages' within the meaning of § 1821 because they are analogous to liquidated damages."); *Aguilar* v. *FDIC,* No. 92-4286 (RR), slip op. at 15-16 (E.D.N.Y. Oct. 4, 1993) (noting that courts have been unwilling to permit plaintiffs to recover amounts more akin to liquidated than compensatory damages); *Lanigan* v. *Resolution Trust Corp.*, No. 91-7216, 1993 WL 792085, slip op. at 5-7 (N.D. Ill. March 30, 1993) (relying on the reasoning in *Howell*).

As the plaintiffs point out, however, the Court of Appeals for the District of Columbia Circuit has taken a different view. In *NBW*, a case involving a collective bargaining agreement between the National Bank of Washington and its employees, the court of appeals determined that in the context of an at will employment relationship, severance payments are "properly characterized as consideration for entering into (or continuing under) the employment contract and therefore are compensable as actual damages under FIRREA." *NBW*, 27 F.3d at 604. Rejecting the "liquidated damages" analogy used by the Court of Appeals for the First Circuit, the court determined that the FDIC was liable for severance payments. *Id.* at 604-05.

In addition to being confronted with division amongst the courts, we must contend with competing policy considerations. On the one hand, we have the concern raised in Howell that in drafting FIRREA, "Congress, faced with mountainous bank failures," was "determined to pare back damage claims founded on repudiated contracts." *Howell*, 986 F.2d at 572. On the other hand, we must address the point raised in NBW that the question is not whether Congress meant to scale back damage claims, but "which damage claims, however few, are preserved." *NBW*, 27 F.3d at 604. Moreover, we are cognizant of the fact that disallowance of promised severance pay may chill a troubled bank's ability to effectively retain able employees. *See Howell*, 986 F.2d at 573.

We share the view of the Court of Appeals for the First Circuit that these payments are analogous to "liquidated damages." We therefore agree with the position of the district court in this case that these damages are not compensable as "actual direct compensatory damages" under 12 U.S.C. § 1821.[9] Accordingly, we will affirm the order of the district court granting summary judgment to the FDIC on the issue of separation pay.

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[9] In reaching this decision, we are not unmindful of the *Hennessy* plaintiffs' argument that under the terms of this severance pay plan, benefits are actually accelerated if the discharged employee finds other employment. Hennessy App. at 106 ("If you are otherwise qualified for separation payments and then become employed during the benefit payment period ... [y]ou will then receive a single-sum cash payment equal to the remaining separation pay to which you would have been entitled had you remained unemployed."). Nevertheless, we believe that the function of these provisions is to articulate the timing of the payment of benefits rather than to relate the purpose behind the SPP.

IV. TERMINATION OF HEALTH AND LIFE INSURANCE BENEFITS

The Campbell and Adolph plaintiffs next allege that the district court erred in granting summary judgment against them on their claims for health and life insurance benefits pursuant to the 65 Special and the MGLIP.[10] According to these plaintiffs, the district court erred in determining that the provisions of § 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3), requiring that every employee benefit plan provide a "procedure for amending such plan," apply only to plan amendments and not to plan terminations. These plaintiffs argue that because the FDIC did not follow the proper "procedure" in terminating their life and health insurance benefits, the FDIC should be responsible for these benefits until such time as the FDIC complies with ERISA. They suggest that a remand is appropriate to decide this question.

Relying on our previous decision in *Schoonejongen* v. *Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), the district court held that when a party seeks to terminate an ERISA plan, there is no requirement that the ERISA plan have a termination procedure. *Campbell*, 1994 WL 475067, at *5. Subsequent to the district court's opinion in this matter, however, the Supreme Court reversed our panel's decision in Schoonejongen. *Curtiss-Wright Corp.* v. *Schoonejongen*, --- U.S. ----, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995). Following that reversal, we decided the case of *Ackerman* v. *Warnaco, Inc.*, 55 F.3d 117 (3d Cir. 1995). In that case, we explicitly held that § 402(b)(3) of ERISA applies to plan terminations as well as plan amendments. *Ackerman*, 55 F.3d at 120. Accordingly, we conclude that the district court erred in holding to the contrary.

Nevertheless, we cannot agree that a remand is appropriate or that the district court erred in granting summary

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[10] The Hennessy plaintiffs take no part in this argument.

judgment for the FDIC. Section 402(b)(3) of ERISA requires that every employee benefit plan shall "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3) (1988). The summary plan booklet for the 65 Special states that:

> Meritor intends the plan to be permanent, but since future conditions affecting your employment cannot be anticipated or foreseen, Meritor reserves the right to *amend*, modify or terminate the plan at any time, which may result in the termination or modification of your coverage.

Campbell App. at 165a. Similarly, the summary plan booklet for the MGLIP states:

> Meritor reserves the right to terminate the group life insurance policy for its employees and retirees at any time, if Meritor determines that such termination is in its best interests. If Meritor terminates its group life insurance policy, employees and retirees who die after the effective date of the termination (other than those who are totally disabled and insured under the provision of "Continuation of Life Insurance During Disability") will not have any life insurance.

Campbell App. at 152a. While section 402(b)(3) of ERISA requires that every employee benefit plan have a procedure for amending or terminating the plan, the Supreme Court has determined that language such as that stated above reserving the right of "the Company" to modify or amend a plan satisfies the requirements of section 402(b)(3). *Curtiss-Wright*, --- U.S. at ---- - ----, 115 S.Ct. at 1228-29 ("Curtiss-Wright is correct, we think, that this states an amendment procedure and one that, like the identification procedure, is more substantial than might first appear."). The Court explained that "the literal terms of § 402(b)(3) are ultimately indifferent to the level of detail in an amendment procedure, or in an

identification procedure for that matter." *Id.* at ----, 115 S.Ct. at 1229. Further, the Court explained that "principles of corporate law provide a ready-made set of rules for determining, in whatever context, who has authority to make decisions on behalf of the company." *Id.* Because the 65 Special and the MGLIP reserve to Meritor (the Company) the right to terminate these plans, we find no violation of the terms of section 402(b)(3).

The question therefore becomes what "procedure" the FDIC must follow when it is appointed receiver for Meritor and it terminates an employee welfare benefit plan pursuant to such a reservation clause. Certainly, under such circumstances, it would make little sense to require the FDIC to follow Meritor's procedure for terminating these plans (i.e., calling a meeting of the Board of Directors of Meritor or taking other corporate action). While the appropriate analog within the FDIC to Meritor's Board of Directors is not immediately apparent, it is clear that an official receiver has great discretion in taking action that would previously have been handled through the normal methods of corporate governance. Thus, the receiver alone may act in ways that might otherwise require Board action. The record reflects, and the plaintiffs concede, that on December 11, 1992, "the FDIC" sent the Campbell and Adolph plaintiffs mailings notifying them of the termination of the 65 Special and the MGLIP. Joint Statement of Undisputed and Disputed Facts Regarding Motions for Summary Judgment, Campbell App. at 416a-17a; Joint Statement of Undisputed and Disputed Facts Regarding Motions for Summary Judgment, Adolph App. at 368a (incorporating statement of undisputed facts in Campbell case by reference). Since the plaintiffs acknowledged that they received notice of the plan terminations from "the FDIC," we decline to require further investigation into the methods by which the FDIC makes its decisions. Accordingly, we will uphold the district court's grant of

summary judgment for the FDIC on plaintiffs' claims for health and life insurance benefits.

V. STATUTORY PENALTY UNDER 29 U.S.C. § 1132(c)(1)

The Campbell plaintiffs next allege that the district court erred in determining that the FDIC was not liable for the penalty found at 29 U.S.C. § 1132(c)(1) for failure to respond in a timely manner to a request for plan documents. According to these plaintiffs, their counsel sent an ERISA document request to the FDIC as administrator of the Meritor Pension Plan and the Meritor Savings Bank Savings Plan on March 16, 1993. The FDIC did not respond until September 21, 1993, 189 days after the initial request. Because ERISA provides that the plan administrator must mail requested material within 30 days of such a request, the Campbell plaintiffs assert that they are entitled to the requisite statutory penalty of up to $100.00 a day for each day the plan administrator failed to comply.

We cannot agree. ERISA provides that an administrator who fails or refuses to mail requested documents within 30 days after such request:

> may *in the court's discretion* be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1)(B) (Supp. V 1993) (emphasis added). The district court in this case made two alternative findings. First, it determined that while by its terms ERISA's requirements and penalties apply to all administrators, "the requirement should not apply to the FDIC since it is an agency of the federal government." *Campbell*, 1994 WL 475067, at *7. Second, it determined that even if the statutory penalty for failure to provide requested information in a timely manner is applicable to the FDIC, "the court shall exercise its

discretion under 29 U.S.C. § 1132(c)(1) and award no penalty in this case." *Id.* The court explained that any penalty applied "would be an unjustifiable windfall to the plaintiffs and would hinder the FDIC in achieving its public mission—the orderly wrapping up of Meritor's affairs." *Id.*

As the district court noted, the issue of whether the penalty provision of § 1132(c)(1) applies to the FDIC when it acts as receiver for a failed financial institution is one of first impression. *Id.* at *6. We agree that nothing on the face of § 1132(c) exempts the FDIC from the requirement of furnishing requested documents in a timely manner. We therefore see no reason to adopt a rule categorically excluding the FDIC from this important ERISA obligation. The reasoning of the district court, that the requirement should not apply to the FDIC since it is an agency of the federal government, is unconvincing. Employees' need for access to significant information about plan coverage does not diminish because the entity currently in charge of the plan is an agency of the federal government.[11]

Concerning the district court's alternative holding, however, we have previously determined that whether a district court awards a plaintiff monetary damages under 29 U.S.C. § 1132(c)(1) is a matter of discretion. *Gillis* v. *Hoechst Celanese Corp.*, 4 F.3d 1137, 1148 (3d Cir. 1993), cert. denied, --- U.S. ----, 114 S.Ct. 1369, 128 L.Ed.2d 46 (1994). Since the district court did determine that any penalty in this case would be an "unjustifiable windfall" and "would hinder" the FDIC in "the orderly wrapping up of Meritor's

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[11] The FDIC suggests that 12 U.S.C. § 1825(b)(3), a FIRREA provision, creates an exemption from the ERISA penalty requirement. That provision states that the FDIC, when acting as receiver, "shall not be liable for any amounts in the nature of penalties or fines." 12 U.S.C. § 1825(b)(3). Read as a whole, however, § 1825 appears to concern exemptions from taxes. We therefore find this argument unconvincing.

affairs," we cannot conclude that the district court abused its discretion in declining to award a statutory penalty. Accordingly, we will affirm the order of the district court denying the Campbell plaintiffs a § 1132(c)(1) penalty award.

VI. CLASS ACTION ISSUES

The Campbell plaintiffs also raise a number of issues concerning the district court's decision to deny certification of three plaintiff classes. The district court determined that the plaintiffs failed to establish the threshold requirements under Rule 23(a) of the Federal Rules of Civil Procedure. *Campbell*, No. 93-3969, at 5, 7, 9 (E.D. Pa. June 30, 1994) (order denying class certification). In addition, the district court found that class certification under Rule 23(b)(1) or Rule 23(b)(2) would be inappropriate. *Id.* at 9. Because of our decision on the merits of the Campbell plaintiffs' claims, that these claims cannot survive summary judgment, we need not address the propriety of the district court's decision to deny class certification. We therefore take no position with respect to these issues.

VII. CONCLUSION

The district court did not err in granting summary judgment to the FDIC on the plaintiffs' claims for separation pay, health insurance benefits, and life insurance benefits. We will therefore affirm the orders of the district court. Further, because the district court did not abuse its discretion in declining to find the FDIC liable for the statutory penalty prescribed by 29 U.S.C. § 1132(c)(1), we will affirm the order of the district court pertaining to this issue. Finally, because of our conclusion on the merits of the Campbell plaintiffs' claims, that the district court did not err in granting summary judgment for the FDIC, we do not reach the class certification issues.

Each party to bear its own costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. ADOLF, et al., Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for MERITOR SAVINGS BANK, Defendant.

Civil Action No. 94-1499

[Filed August 29, 1994]

JUDGMENT

AND NOW, this 26th day of Aug., 1994, it is hereby ORDERED that judgment is entered in favor of the defendant and against the plaintiffs.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID A. CAMPBELL, JR., et al., Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for MERITOR SAVINGS BANK, Defendant.

Civil Action No. 93-3969

[Filed August 29, 1994]

JUDGMENT

AND NOW, this 26th day of Aug., 1994, it is hereby ORDERED that judgment is entered in favor of the defendant and against the plaintiffs.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. ADOLF, et al., Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for MERITOR SAVINGS BANK, Defendant.

Civil Action No. 94-1499

[Filed August 29, 1994]

ORDER

AND NOW, this 26th day of Aug., 1994, upon consideration of Plaintiffs' Motion for Partial Summary Judgment, Defendant's Motion for Summary Judgment and the responses thereto, it is hereby ORDERED that the Plaintiffs' Motion is DENIED and Defendant's Motion is GRANTED.

Plaintiffs' claims for severance pay under the Meritor severance pay program ("SPP") are denied for the reasons detailed in the Court's Order of July 29, 1994 in *Hennessey v. Federal Deposit Insurance Corporation as receiver for Meritor Savings Bank*, No. 93-5589, 1994 WL 393074 (E.D. Pa. July 29, 1994).

Plaintiffs' claims for benefits under the Meritor Group Life Insurance Plan ("MGLIP") and the Meritor Medical Plan 65 Special Option ("65 Special") are denied for the reasons outlined in the Court's order granting Summary Judgment in favor of the FDIC in *Campbell v. Federal Deposit Insurance*

Corporation as receiver for Meritor Savings Bank, No. 93-3969.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

APPENDIX E

David A. CAMPBELL, Jr., et al., Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for Meritor Savings Bank, Defendant

Civ. A. No. 93-3969.

United States District Court,
E.D. Pennsylvania.
Aug. 29, 1994.

Harry C. Barbin, William M. O'Connell, Barbin Lauffer & O'Connell, III, Rockledge, PA, for plaintiffs.

Juan J. Laureda, Henry K.W. Woo, Laureda & Bosch, Jose L. Ongay, Philadelphia, PA, Michael O'Brien Boldt, Paul Ramirez, Bourne, Nell and Kenyon, Summit, NJ, Mary Beth Sullivan, Seyfarth, Shaw, Fairweather & Geraldson, Washington, DC, for defendants.

KATZ, District Judge.

ORDER AND MEMORANDUM

AND NOW, this 26th day of Aug., 1994, upon consideration of Plaintiffs' Motion for Summary Judgment, Defendant's Motion for Summary Judgment and the responses thereto, it is hereby ORDERED that the Plaintiffs' Motion is DENIED and the Defendant's Motion is GRANTED.

This is an action by former employees of Meritor Saving Bank ("Bank") to recover severance pay and other benefits from the Federal Deposit Insurance Corporation ("FDIC") following the FDIC's takeover of the Bank. The parties' cross-motions for summary judgment raise the following issues:

1. Does this court have subject matter jurisdiction over the plaintiffs' claims?

2. Are the plaintiffs entitled to severance benefits under the Bank's severance pay program?

3. Are the plaintiffs entitled to recover medical and life insurance benefits under the Bank's employee welfare benefits plans?

4. Is the FDIC liable for damages as a result of its failure to respond to plaintiffs' requests for information under ERISA?

I. UNDISPUTED FACTS

A. The Parties

The plaintiffs are former employees and retirees of the Bank. Joint Statement of Undisputed And Disputed Facts Regarding Motion for Summary Judgment [hereinafter "Joint Statement"] ¶ 2. Plaintiff David A. Campbell, Jr. retired from the Bank effective December 1, 1987. *Id.* ¶ 52. Plaintiffs Robert F. Hanna, Helen DeMarco and Leslie Voth were employed by the Bank on December 11, 1992. *Id.* ¶¶ 59, 64; Joint Statement of Disputed and Undisputed Facts Regarding Motions for Summary Judgments in *Adolf v. FDIC*, 94-1499 (hereinafter *Adolf* Joint Statement),[1] ¶ 57. Defendant FDIC became the receiver for the Bank and its parent unit, the Meritor Financial Group (the Bank and its parent are hereinafter collectively referred to as "Meritor") on December 11, 1992.

B. The Benefit Packages

Meritor offered its employees and retirees several different benefit packages. Meritor offered its employees and retirees life insurance coverage. Meritor also offered its retirees health insurance coverage. During a period of major

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[1] The parties agreed that the facts stipulated to in the *Adolf* Joint Statement may be considered in deciding the case at bar. *Adolf* Joint Statement, p. 2 n. 1.

downsizing, Meritor created a severance pay program ("SPP") in order to retain its existing employees.

The SPP covered plaintiffs Hanna, DeMarco and Voth. *See* Joint Statement ¶ 45. The SPP was "designed to provide financial assistance during an Employee's transition to unemployment following an involuntary separation from the service of Meritor Savings Bank where that separation results from lack of work, job elimination, reorganization, or reduction-in-force." Pls.' App. p. 156. The SPP's Plan Document stated that "This document also preserves Meritor's right to modify the Program at any time and from time to time and to discontinue the Program in whole or in part at any time." *Id.* The SPP was an "employee welfare benefit plan" as defined by the Employment Retirement Income Security Act of 1974 (ERISA). *Id.*; *see also* 29 U.S.C. § 1002(1). The SPP was "unfunded." Joint Statement ¶ 7. That is, the general assets of Meritor would be used to pay any benefits due under the SPP. *Id.*

In addition, Meritor maintained the Meritor Group Life Insurance Plan ("MGLIP") to provide group term life insurance for its employees and retirees. Joint Statement ¶ 10. Under MGLIP, qualified employees were entitled to life insurance coverage in an amount equal to twice their annual Meritor salary. *Id.* ¶ 12. Qualified retirees were entitled to death benefit coverage equal to the lesser of $50,000 or 25 percent of the amount of death benefit coverage for which they were insured immediately prior to retirement. *Id.* Life insurance benefits were provided through a third party insurance carrier. *Id.* ¶ 41. MGLIP was an ERISA "employee welfare benefit plan." MGLIP contained the following reservation of rights provision:

> Finally, Meritor reserves the right to terminate the group life insurance policy for its employees and retirees at any time, if Meritor determines that such termination is in its best interests.

Pls.' App. p. 211. Plaintiff Campbell was a participant in MGLIP. Joint Statement ¶ 55.

Meritor provided group health insurance coverage for its retirees under the Meritor Medical Plan 65 Special Option ("65 Special"). Joint Statement ¶ 14. The 65 Special was a self-insured plan which was administered by a third party. *Id.* ¶ 16. The 65 Special was an ERISA "employee welfare benefit plan." The 65 Special contained the following reservation of rights:

> Meritor intends the plan to be permanent, but since future conditions affecting your employer cannot be anticipated or foreseen, Meritor reserves the right to amend, modify or terminate the plan at any time, which may result in the termination or modification of your coverage.

Pls.' App. p. 173 (emphasis in the original). Plaintiff Campbell was a participant in 65 Special. Joint Statement ¶ 53.

C. The Closing of Meritor

On December 11, 1992, the Secretary of Banking of the Commonwealth of Pennsylvania determined that Meritor was in an unsafe and unsound condition. Joint Statement ¶ 3. Accordingly, she closed the Bank and placed it in receivership. *Id.* Also on December 11, 1992, the FDIC was appointed as Meritor's receiver. *Id.* The FDIC immediately accepted this appointment. *Id.*

Later on December 11, 1992, the FDIC closing manager, Jack Goodner, made a brief presentation to Meritor employees. Joint Statement ¶¶ 18-19. When he finished his comments an employee asked whether severance benefits would be paid. *Id.* ¶ 21. Goodner thought not, but was not sure. *Id.* ¶¶ 22-26. After looking towards two other FDIC officials for guidance, Goodner responded "No." *Id.*

On the Monday following the events of Friday, December 11, 1992, described above, the former branches of Meritor opened for business as usual under the name Mellon--PSFS without interruption to the business of regular customers.

The FDIC repudiated the SPP pursuant to its power under 12 U.S.C. § 1821(e). Joint Statement ¶ 9. Plaintiffs Hanna, DeMarco and Voth's employment terminated on December 11, 1992 upon the closing of Meritor. Joint Statement ¶¶ 59, 64; *Adolf* Joint Statement ¶ 57. The FDIC denied plaintiffs Hanna, DeMarco and Voth's claims for severance payments.[2] Joint Statement ¶ 45. The FDIC has a long standing but unwritten policy and practice of not paying severance claims filed by employees of failed banks. *Id.* ¶ 43.

The FDIC did not repudiate either the 65 Special or the MGLIP plans. *Id.* ¶ 41. Instead, the FDIC terminated these plans pursuant to the terms of each plan.[3] *Id.* The 65 Special and the MGLIP plans lacked any provision plan termination. Def.'s Mem. in Opp. to Pls.' Mot. for Summ. J., p. 13. The parties dispute whether the FDIC was required to take any steps prior to termination to make the termination of these employee welfare benefit plans effective. *Joint Statement* ¶ 41 nn. 4 & 5. The FDIC sent written notices of

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[2] The FDIC does not assert that the severance payments plaintiffs seek are "golden parachute payments." *Cf.* 12 U.S.C. § 1828(k)(4) (defining golden parachute payments). The FDIC may prohibit or limit any golden parachute payments regardless of whether such payment is fixed and certain at the time of the institutions insolvency. 12 U.S.C. § 1828(k)(1).

[3] The FDIC asserts that the 65 Special and the MGLIP plans "terminated upon the closure of Meritor and the appointment of the FDIC as Receiver for Meritor Saving Bank." Pls.' App. 52, 54-55 (quoting Def.'s Resp. to Pls.' Second Set of Interogs.).

the termination of MGLIP and 65 Special to the participants in each plan. *Id.* ¶¶ 40, 71. The notice to the plan's participants stated that the bank would terminate all employee welfare benefit plans effective December 31, 1992.[4] Lussier Certification, ¶ 2. Included with this notice was a letter titled "Notice to Creditors" (the "Creditor Notice"). *Id.* ¶ 3. The Creditor Notice advised Meritor creditors that they had until March 19, 1993 to file any claims with the FDIC. *Id.* ¶ 3 and Ex. B. The Creditor Notice also stated that "all claims must be actually received by March 19, 1993 to be timely filed." *Id.* Ex. B.

The plaintiffs filed claims for benefits with the FDIC.[5] The FDIC rejected each of the plaintiffs' claims.[6] The plaintiffs filed the instant complaint on July 23, 1993. Joint Statement ¶ 1.

The Complaint asserts four separate claims. First, plaintiffs Hanna and DeMarco seek severance payment pursuant to the SPP. Second, plaintiff Campbell seeks a

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[4] The FDIC funded the payment of claims under the 65 Special through December 31, 1992. Joint Statement ¶ 41. The FDIC ceased MGLIP coverage effective December 31, 1992. *Id.*

[5] Plaintiff Campbell mailed his proof of claim regarding the 65 Special and the MGLIP on January 22, 1993. Joint Statement ¶ 57. Plaintiff Hanna mailed his proof of claim regarding severance pay on December 30, 1992. *Id.* ¶ 62. Plaintiff DeMarco mailed her proof of claim regarding severance pay on January 5, 1993. *Id.* ¶ 66. Plaintiff Voth mailed her proof of claim regarding severance pay on March 10, 1993. *Adolf* Joint Statement ¶ 57.

[6] The FDIC rejected plaintiff Campbell's claim on January 24, 1994. Joint Statement ¶ 58. The FDIC rejected plaintiff Hanna's claim on May 27, 1993. *Id.* ¶ 63. The FDIC rejected plaintiff DeMarco's claim regarding severance pay on May 27, 1993. *Id.* ¶ 67. The FDIC rejected plaintiff Voth's claim on January 24, 1994. *Adolf* Joint Statement, ¶ 57.D.

declaration that he and other similarly situated persons are entitled to health insurance coverage under the 65 Special. Compl. p. 24. Campbell also seeks reimbursement with interest for health insurance premiums paid since December 11, 1992. *Id.* p. 35. Third, plaintiffs Campbell and Hanna seek a declaration that they and other similarly situated persons are entitled to life insurance coverage under the MGLIP. Compl. p. 32. They also seek reimbursement with interest for life insurance premiums paid from December 11, 1992. *Id.* p. 33. Fourth, plaintiffs Campbell, Hanna, Voth and DeMarco seek a monetary penalty under ERISA for the FDIC's failure to provide information requested. Compl. § III.

II. DISCUSSION

A. Jurisdiction

The court's jurisdiction over claims made under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") 103 Stat. 183 (codified in various sections of 12 and 18 U.S.C.) is limited to instances where the plaintiffs have exhausted their administrative remedies with the FDIC. 12 U.S.C. § 1821(d)(13)(D). For the court to have subject matter jurisdiction over a plaintiff's claim that plaintiff must first file his/her claim with the FDIC and then wait for the initial processing of that claim by the FDIC pursuant to 12 U.S.C. §§ 1821(d)(5) and (6)(A). *Rosa* v. *Resolution Trust Corp.*, 938 F.2d 383, 391-392 (3d Cir. 1991). Within 60 days after the 180-day period following a claim's submission, or within 60 days of the date of any notice of disallowance, a claimant may seek judicial review of the FDIC's disallowance or inaction by filing a complaint in a district court. *FDIC* v. *Shain, Schaffer & Rafanello*, 944 F.2d 129, 132 (3d Cir. 1991). The court's subject matter jurisdiction is tested as of the time the complaint is filed. *Rosa*, 938 F.2d at 392 n. 12.

Claims asserted against the assets of a failed financial institution must be filed in a timely fashion or they are barred. Claims filed after the date specified in a creditor notice (in this case March 19, 1993) are disallowed. 12 U.S.C. § 1821(d)(5)(C)(i). Any FDIC disallowance for failure to file a timely claim is final and unappealable. *Id.* The only exception to this principle is if the claimant did not receive notice of the appointment of the receiver in sufficient time to file a claim with the FDIC. 12 U.S.C. § 1821(d)(5)(C)(ii).

Before the court can address the merits of the plaintiffs' claims, the court must determine whether the plaintiffs complied with section 1821(d)(5)'s filing requirements. The parties do not dispute that plaintiffs Hanna and DeMarco filed timely actions. The FDIC, however, asserts that plaintiffs Campbell and Voth's actions are each untimely.[7] FDIC Mem. (Corrected) for Summ. J., p. 58-59. Plaintiff Campbell mailed his claim to the FDIC on January 22, 1993. The FDIC received plaintiff Campbell's Proof of Claim on January 29, 1993. Lussier Certification, Ex. J. On March 10, 1993, Voth filed her proof of claim with the FDIC. Lussier Certification, ¶ 12. The instant Complaint was filed on July 23, 1993 (that is 175 days after the FDIC received Campbell's proof of claim). Section 1821(d)(5)(A)(i) provides the FDIC with a 180 day period to allow or disallow a claim. This 180 day period begins "on the date any claim against a depository institution is filed" with the FDIC. 12 U.S.C. § 1821(d)(5)(A)(i).

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[7] Plaintiffs Campbell and Voth were added as individual plaintiffs in the *Adolf* case by the filing of the First Amended Complaint in that case. To the extent that these individual plaintiffs failed to state a claim for relief in this case due to premature filing (i.e. a procedural grounds for dismissal), the plaintiffs assert a timely filing in *Adolf*. Pls.' Mem. in Opp. to FDIC's Mot. for Summ. J. p. 13 n. 6. I agree.

The court finds it does not have jurisdiction to hear either plaintiffs Campbell or Voth's actions. The court finds that plaintiff Voth's filing in the instant case was untimely, because she filed suit before the 180 day period expired. The court also finds plaintiff Campbell's filing untimely. Section 1821(d)(5)(A)(i) provides that the 180 day clock starts ticking on the date any claim "is filed." Mailing is not equivalent to filing. The date the FDIC received plaintiff Campbell's proof of claim is the date that Campbell filed his claim with the FDIC. Because the FDIC did not receive plaintiff Campbell's Proof of Claim until January 29, 1993, the action he commenced on July 23, 1993 was premature. This court has no jurisdiction to hear his claims.

B. Severance Pay

Plaintiffs Hanna and DeMarco's claims for severance pay under the SPP are denied for the reasons outlined in the Court's Order of July 29, 1994 in *Hennessey* v. *Federal Deposit Insurance Corporation as receiver for Meritor Savings Bank*, No. 93-5589, 1994 WL 393074 (E.D. Pa. July 29, 1994).

C. 65 Special and MGLIP claims

Assuming *arguendo* that this court has jurisdiction to hear plaintiff Campbell's employee welfare benefit claims, these claims must fail. The FDIC terminated both the 65 Special and the MGLIP plans pursuant to its contractual rights.[8] Def.'s Mem. § III.I.C. By the terms of the MGLIP plan, the plan could be terminated "at any time, if Meritor determines that such termination is in its best interests." Pls.' App. p. 211. The 65 Special also allowed for the termination of "the plan at any time." Pls.' App. p. 173.

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[8] The FDIC does not assert that it repudiated either the 65 Special Plan or the MGLIP plan pursuant to its power under FIRREA. Def.'s Mem. at p. 21.

The plaintiffs had no fixed rights to the benefits provided under Meritor's employee welfare benefit plans. The plaintiffs' rights to life insurance and health benefits were not vested. The plans at issue, by their express terms, could be terminated at any time. The FDIC merely exercised those powers formerly possessed by Meritor to terminate the plans. Additionally, the FDIC sent letters to former employees and retirees which provided adequate notice of the termination. See 29 U.S.C. § 1024(b)(1); Pls.' App. 52, 54-55; Def.'s Mem. in Opp. to Pls.' Mot. for Summ. J., p. 13- 14.

While the Meritor plans lacked a written procedure for plan termination, this is not determinative. A recent Third Circuit case *Schoonejongen v. Curtis-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994) does not require an opposite conclusion. *Schoonejongen* addressed the previously open question of whether an ERISA amendment is effective when the original plan's governing documents fail to provide a procedure for amending such plan in violation of § 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3). The *Schoonejongen* court held that if an ERISA employee welfare benefit plan lacks a procedure for amendment, no amendments to such a plan are valid until an amendment procedure is adopted and substantially complied with. The *Schoonejongen* decision, however, does not apply to plan termination. 18 F.3d at 1040-41. The court explicitly held that a plan may be terminated without implicating § 402(b)(3). *Id.* at 1040. Therefore, as opposed to the situation when a party seeks to amend an ERISA plan, when a party seeks to terminate a plan there is no requirement that the ERISA plan have a termination procedure.

D. Failure to Respond

Plaintiffs Campbell, Hanna, Voth and DeMarco all participated in Meritor's Pension and 401(k) Plans. On March 16, 1993, pursuant to 29 U.S.C. § 1132(c), the plaintiffs' attorney sent the FDIC, as plan administrator, an

ERISA document request.[9] Joint Statement ¶ 68; Declar. of Barbin for Support of Pls.' Motion for Summ. J. The FDIC did not provide the documents plaintiffs' counsel requested until September 21, 1993 (189 days after the original request). *Id.* ¶ 70. Plaintiffs seek a $127,200 ($100 a day per plaintiff) penalty from the FDIC for its failure to provide the documents requested on a timely basis. See 29 U.S.C. § 1132(c)(1).

ERISA provides that an administrator who fails or refuses to comply with a request for any information, which that administrator is required to furnish to a plan participant, may, in the court's discretion, be personally liable to such participant for up to $100 a day from the date of the refusal. 29 U.S.C. § 1132(c)(1). An "administrator" is defined as 1) a person so designated by the terms of the plan; 2) if an administrator is not so designated, the plan sponsor; or 3) if a administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may prescribe. 29 U.S.C. § 1002(16)(A). The term "plan sponsor" means the employer in the case of an employee benefit plan established or maintained by a single employer. 29 U.S.C. § 1002(16)(B). The FDIC assumed the duties of "administrator" sometime after its takeover of Meritor.

By its terms, ERISA's penalty section appears to apply to "[a]ny administrator" without exception. 29 U.S.C. § 1132(c)(1). However, section 1132(c)(1) does not apply to a plan if that plan is a "governmental plan."[10] 29 U.S.C.

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[9] The FDIC disputes the plaintiffs' contention that the March 16, 1993 letter was a proper ERISA document request. Joint Statement, p. 14 ¶ 68 n. 7.

[10] A "governmental plan" is defined as one "established or maintained for its employees" by an agency or instrumentality of the United States. 29 U.S.C. § 1002(32) (emphasis added). Neither side has argued that Meritor's plan became a governmental plan

§ 1003(b)(1); see also *Shirley* v. *Maxicare Texas, Inc.*, 921 F.2d 565, 567 (5th Cir. 1991) (ERISA does not apply to any employee benefit plan if such plan is a governmental plan). No reported cases address the issue of whether section 1132(c)(1)'s penalty provision applies to the FDIC when the FDIC acts as receiver for a failed financial institution.

The FDIC asserts that it is exempted from section 1132(c)(1)'s penalty provision by 12 U.S.C. § 1825(b)(3). Section 1825 exempts the FDIC from liability "for any amounts in the nature of penalties or fines, including those arising from the failure to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due." 12 U.S.C. § 1825(b)(3). This section generally exempts the FDIC from all taxation on "[a]ll notes debentures, bonds or other such obligation issued" by the FDIC and "all taxation imposed by any State, county, municipality or local taxing authority." 12 U.S.C. §§ 1825(a), 1825(b)(1). While the "penalty or fine" clause could be read broadly to supersede ERISA's penalty section, read in context, the clause appears to encompass only typical and usual government taxes and the penalties or fines imposed for the failure to pay such taxes.

Three courts have dealt with the applicability of penalties against federal agencies acting as bank receivers. In *FDIC* v. *Southwest Motor Coach Corp.*, 780 F.Supp. 421 (N.D. Tex. 1991), an action by the FDIC to recover on a promissory note, the court held the FDIC immune from penalties imposed by Texas' usury laws. The court based its decision on the doctrine of sovereign immunity and section 1825(b)(3). *Id.* at 423. The court found that such immunity had not been waived in the case before it. *Id.* In another case involving Texas' usury laws, the Fifth Circuit held that

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upon the FDIC's appointment as receiver.

> inasmuch as the FDIC was created to serve the public interest, the usury claim which is punitive in nature under Texas law, cannot be asserted against the FDIC as such application could have no deterrent effect, and would only serve to punish innocent creditors of the failed institution by diminishing available assets.
>
> This rule that a claim for punitive damages cannot be asserted against institutions created to serve the public interest has been applied to receivers for insolvent banks.

FDIC v. *Claycomb*, 945 F.2d 853, 861 (5th Cir. 1991). Finally, in a case involving banking fraud by a predecessor bank, the New Jersey District Court held, on public policy grounds, that punitive damages may not be assessed against the RTC as it was a public instrumentality. *Tuxedo Beach Club Corp.* v. *City Federal Savings Bank*, 749 F.Supp. 635, 649-50 (D. N.J. 1990). The court reasoned that "where the wrongful party is in receivership and the fine would ultimately be paid by innocent creditors" the purpose behind imposing punitive damages has little weight. *Id.*

The reasoning in the three cases cited above is persuasive. While ERISA's requirements and penalties apply on their face to all administrators, the requirement should not apply to the FDIC since it is an agency of the federal government. See 29 U.S.C. § 1003(b)(1). Alternatively, to the extent that the requirement does apply to the FDIC in this case, the court shall exercise its discretion under 29 U.S.C. § 1132(c)(1) and award no penalty in this case. Any penalty applied would be an unjustifiable windfall to the plaintiffs and would hinder the FDIC in achieving its public mission—the orderly wrapping up of Meritor's affairs.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID A. CAMPBELL, JR., et al., Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for MERITOR SAVINGS BANK, Defendant.

Civil Action No. 93-3969

[Filed Aug. 29, 1994]

ORDER

AND NOW, this 26th day of Aug., 1994, upon consideration of Plaintiffs' Motion for Reconsideration, it is hereby ORDERED that the Motion is DENIED as moot.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

APPENDIX G

John T. HENNESSY, et al., Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for Meritor Savings Bank, Defendant.

Thomas CALLAHAN, Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for Meritor Savings Bank, Defendant.

Civ. A. Nos. 93-5589, 94-1949.

United States District Court,
E.D. Pennsylvania.
July 29, 1994.

Alice W. Ballard, Samuel & Ballard, P.C., Philadelphia, PA, for plaintiffs.

Jose L. Ongay, Philadelphia, PA, Michael O'Brien Boldt, Bourne, Nell and Kenyon, Summit, NJ, Mary Beth Sullivan, Seyfarth, Shaw, Fairweather & Geraldson, Washington DC, for defendant.

ORDER AND MEMORANDUM

KATZ, District Judge.

AND NOW, this 29th day of July, 1994, upon consideration of Plaintiffs' Motion for Summary Judgment, Defendant's Motion for Summary Judgment and the responses thereto, it is hereby ORDERED that the Plaintiffs' Motion is DENIED and Defendant's Motion is GRANTED.

This is an action by former managers of Meritor Saving Bank ("Bank") to recover severance pay from the Federal Deposit Insurance Corporation ("FDIC") following the FDIC's takeover of the Bank. The parties' cross-motions for summary judgment raise a number of issues:

1. Did the events surrounding the closing of the Bank constitute a "reorganization" which would trigger the Bank's severance pay plan (SPP)?

2. Did the plaintiffs' rights to severance pay vest prior to their termination? That is, did the plaintiffs' rights to severance pay become fixed and certain prior to the appointment of the FDIC as receiver?

3. Did the FDIC repudiate the severance plan?

4. Are the plaintiffs' claimed damages actual compensatory damages?

I. FACTS

The plaintiffs are all former managers of the Bank. During a period of major downsizing,[1] the Bank's parent unit, the Meritor Financial Group (the Bank and its parent are hereinafter collectively referred to as "Meritor"), created a severance pay program ("SPP") in order to retain employees. See Pls.' Ex. C., McCarron Dep. p. 48-49.

The plaintiffs each received personally addressed, but otherwise essentially identical letters, dated October 3, 1990, from Meritor's Chairman Roger S. Hillas. Statement of Undisputed Facts, ¶ 9; see also Second Amended Compl., Ex. B. The letters addressed Meritor's SPP. The operative parts of these letters state:

> Meritor senior management is acutely aware that it is essential to retain motivated employees such as you in key positions.
>
> As evidence of this awareness, Meritor is extending the severance benefit provided to you under the Separa-

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[1] Between 1988 and 1992, Meritor divested many of its assets and business units. This resulted in a reduction in the number of Meritor employees from roughly 4,500 to roughly 1,000. Statement of Undisputed Facts, ¶ 2.

> tion Pay Program to a total of 52 weeks pay. This enhanced benefit will be payable under the same terms and conditions as provided for in the Separation Pay Program if you are separated from employment by Meritor anytime on or before December 31, 1992.[2]

Second Amended Compl., Ex. B.

The SPP was "designed to provide financial assistance during an employee's transition to new employment following an involuntary separation from the service of Meritor Financial Group where that separation results from lack of work, job elimination, reorganization, or reduction-in-force." Second Amended Compl, Ex. A, p. 1. The Summary Description of the SPP[3] stated that "Meritor reserves the right to modify the Separation Pay Program at any time and from time to time, and to discontinue the Program in whole or in part at any time." *Id.* The SPP was an "employee welfare benefit plan" as defined by the Employee Retirement Income Security Act of 1974 (ERISA). Statement of Undisputed Facts, ¶ 6; see also 29 U.S.C. § 1002(1).

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[2] Plaintiffs Callahan, Gibson and Soriero received letters extending their benefits for 26 weeks, rather than 52 weeks. Statement of Undisputed Facts, ¶ 11.

[3] The Summary Description states that "this booklet is a *summary* only, and that the details of the Separation Pay Program are explained in full detail in the Corporate Policy Manual." Second Amended Compl, Ex. A, p. 1 (emphasis in the original). The description goes on to state that if any inconsistency exists between the information described in the summary and the description in the Corporate Policy Manual, the Corporate Policy Manual will govern the outcome. *Id.* The Corporate Policy Manual is not part of the record before the court. Therefore, the Summary Plan Description controls any issue of the SPP's interpretation. *See* Statement of Undisputed Facts, ¶ 6, n. 1.

On December 11, 1992, the Secretary of Banking of the Commonwealth of Pennsylvania determined that Meritor was in an unsafe and unsound condition. Statement of Undisputed Facts, ¶ 13. Accordingly, she closed the Bank and placed it in receivership. *Id.* Also on December 11, 1992, the FDIC was appointed as Meritor's receiver and it accepted this appointment. *Id.* The FDIC as receiver then executed a Purchase and Assumption agreement with Mellon Bank ("Mellon").[4] *Id.*¶ 14; Pls.' Ex. F. This agreement transferred a portion of Meritor's assets and liabilities (but not liabilities for severance payments) to Mellon.[5] *Id.* The assets transferred totaled approximately $2.9 billion dollars. Pls.' Ex. E. The FDIC retained approximately $1.4 billion worth of assets not transferred to Mellon. *Id.*

Later on December 11, 1992, the FDIC closing manager, Jack Goodner, made a brief presentation to Meritor employees. When his comments were finished an employee asked whether severance would be paid. Statement of Undisputed Facts ¶ 15. Goodner thought not, but was not sure. *Id.* After looking towards two other FDIC officials for guidance,

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[4] In 1992, Meritor proposed to the FDIC that Meritor would sell the rest of its deposits and liquidate the remaining assets in a transaction following the pattern of the 1990 sale of its suburban bank branches to Mellon. Statement of Undisputed Facts, ¶¶ 2, 3. The FDIC in its corporate capacity never rejected the proposal. *Id.*

[5] The Purchase and Assumption agreement provided that Mellon would purchase: a) certain assets related to Meritor's banking business; b) Meritor's credit card business; c) Meritor's safe deposit, safekeeping and trust businesses, and d) its rights to provide mortgage services for others. Statement of Undisputed Facts, ¶ 14. Mellon assumed various liabilities, including liabilities on customer deposit accounts. Also, Mellon was given an option to purchase or lease Meritor branches and other bank premises owned or leased by Meritor. *Id.*

Goodner responded "No." *Id.*; Def. Ex. 4, Goodner Dep. p. 26-27.

The plaintiffs' employment terminated on December 11, 1992 upon the appointment of the FDIC as receiver.[6] Def.'s Am. Answer ¶ 16. The FDIC denied all the plaintiffs' claims for severance payments.[7] Statement of Undisputed Facts ¶ 15; Second Amended Compl., Ex. C. The FDIC has a long established but unwritten policy and practice of not paying severance claims filed by employees of failed banks. *Id.* ¶ 18.

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[6] On December 11th, following the FDIC's appointment as receiver, a meeting for Meritor employees was held. At the meeting no one ever explicitly informed the Meritor employees that they were terminated. Pls.' Ex. J, Goodner Dep., p. 42. Effective at the close of business on December 11, 1992, plaintiffs became employees of Keytech Resources, Inc. Statement of Undisputed Facts, ¶ 20. Keytech was an employment service working for Mellon Bank. *Id.* While Mellon expressed an intention to hire a substantial number of employees, it had no obligation to do so. See Def. Ex. 17, Mancini Dep. Ex. 26. Mellon also indicated that the FDIC "terminated all Meritor employees" on December 11, 1992. *Id.* Plaintiffs who were terminated involuntarily from Keytech received some severance pay based on their years of service with Meritor. Statement of Undisputed Facts, ¶ 21; *see, e.g.*, Def.Ex. 1., Bracken Dep., p. 50 (two weeks severance). Mellon ultimately paid for these severance expenditures. Def. Ex. 10, Hitchcock Dep. p. 13. No Meritor assets were used to make these payments. Statement of Undisputed Facts, ¶ 22.

[7] The FDIC does not assert that the severance payments plaintiffs seek are "golden parachute payments." Cf. 12 U.S.C. § 1828(k)(4) (defining golden parachute payments). The FDIC may prohibit or limit any golden parachute payments regardless of whether such payment is fixed and certain at the time of the institutions insolvency. 12 U.S.C. § 1828(k)(1).

On the Monday following the events of Friday, December 11, 1992, described above, the former branches of Meritor opened as usual under the name Mellon-PSFS without interruption to the business of regular customers. Statement of Undisputed Facts ¶ 5.

II. DISCUSSION

A. Was there a reorganization?

While the plaintiffs argue that their severance rights under the SPP were activated when they were terminated as part of a reorganization,[8] the facts and the law do not support this contention. The critical question is whether the new entity carried forward the business enterprise of Meritor. *Atlas Tool Co.* v. *Commissioner of Internal Revenue*, 614 F.2d 860, 868-867 (3d Cir.), *cert. denied*, 449 U.S. 836, 101 S.Ct. 110, 66 L.Ed.2d 43 (1980). The FDIC sold part of Meritor to Mellon and is in the process of liquidating the rest. This does not constitute a continuation of business, but rather a termination of business. Because the FDIC was involved with the termination of Meritor rather than the continuation of its business, there was no reorganization. *Id.* The sale of assets from one entity to another without retention of any interest by the seller in the purchase is not a reorganization. *Cortland Specialty Co.* v. *Commissioner of Internal Revenue*, 60 F.2d 937, 939 (1932), cert. denied, 288 U.S. 599, 53 S. Ct. 316, 77 L.Ed. 975 (1933). This was not a corporate readjustment of existing interests. *United States* v. *Niagara Hudson Power Corp.*, 53 F. Supp. 796, 801 (S.D.N.Y.1944).

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[8] Because the term "reorganization" is not defined in the SPP, the court will use its ordinary meaning. The word "reorganization" is defined as "the act or process of reorganizing." Webster's New Collegiate Dictionary 972 (1979). "Reorganize" is defined as "to organize again or anew." *Id.*

B. Vesting

The rights of parties are determined as of the closing time of a financial institution and the appointment of a receiver. *In re Christian A. Fisher Building & Loan Assoc.*, 339 Pa. 5, 7, 14 A.2d 98 (1940). The receiver may only pay claims that were fixed and certain (i.e. provable) at the time of appointment. See *Kennedy* v. *Boston-Continental Nat'l Bank*, 84 F.2d 592, 597 (1st Cir. 1936), cert. dismissed, 300 U.S. 684, 57 S.Ct. 667, 81 L.Ed. 887 (1937). *Kennedy*, a leading case in the area and the principal authority cited by both sides, states that

> to establish a claim against an insolvent national bank in receivership the liability of the bank (here the lessee) must have accrued and become unconditionally fixed **on or before the time it was declared insolvent.**
>
> The amount of the claim may be later established, but, when established, it must be the amount *due* and *owing* **at the time of the declaration of insolvency**.... If nothing is due **at the time of insolvency**, the claim should not be allowed.

Kennedy, 84 F.2d at 597 (bold emphasis added, italics emphasis in the original) (citations omitted); see also *Dababneh* v. *FDIC*, 971 F.2d 428, 434 (10th Cir. 1992) (the claims "must have been in existence before insolvency") (quoting *FDIC* v. *Liberty Nat'l Bank*, 806 F.2d 961, 965 (10th Cir. 1986)).

The plaintiffs had no contractual rights to severance benefits at the time the FDIC was appointed receiver. The letters sent to the plaintiffs did not create any greater right to severance benefits than those possessed by other Meritor employees. The October 3, 1990 letters specifically limited plaintiffs benefits to "the same terms and conditions as provided for in the Separation Pay Program." See Second Amended Compl., Ex. B. The SPP explicitly stated that the plan may be withdrawn at any time. Second Amended

Compl., Ex. A, p. 1. Therefore, the plaintiffs' rights to severance did not vest by virtue of the October 3, 1990 letter. The only way the plaintiffs' rights could have vested was by the occurrence of one of the enumerated conditions precedent in the SPP (i.e. "involuntary separation from the service of Meritor Financial Group where that separation results from lack of work, job elimination, reorganization, or reduction-in-force.") during the period in which the SPP was in effect.

Pursuant to its terms, the SPP could have been terminated at any time. An employer may generally terminate welfare benefit plans at will, so long as the procedure followed is consistent with the plan and ERISA. *Deibler* v. *Local Union 23*, 973 F.2d 206, 210 (3d Cir. 1992). Because both the FDIC and Meritor had the right to terminate the SPP at will, the plaintiffs had no vested right to severance pay.

The plaintiffs have the burden of showing that they were involuntarily separated before the appointment of the receiver. See Dababneh, 971 F.2d at 434. Since plaintiffs were not terminated prior to the appointment of the FDIC as receiver, their rights to severance pay did not vest until after Meritor was declared insolvent by the Commonwealth's Secretary of Banking.

Since the plaintiffs' rights to severance did not arise prior to the FDIC takeover, the court must now address whether their right to severance arose after the FDIC takeover.

C. Repudiation

1. FDIC's right to repudiate

Plaintiffs cannot recover severance pay in this case because the FDIC repudiated the SPP upon its appointment as receiver. As receiver, the FDIC had the power to repudiate any contract that it determines to be "burdensome" in order to "promote the orderly administration of the institution's affairs." 12 U.S.C. § 1821(e)(1); *Howell* v. *FDIC*, 986 F.2d 569 (1st Cir. 1993). The FDIC may exercise its right to

repudiate within a reasonable time period following its appointment as receiver. 12 U.S.C. § 1821(e)(2); see also *1185 Ave. of America Assoc.* v. *RTC*, 22 F.3d 494, 498 (2d Cir. 1994) (repudiation after 90 days not unreasonable under the circumstances). If the FDIC chooses to repudiate a contract, it may repudiate a contract retroactively to its date of appointment as receiver. 12 U.S.C. § 1821(e)(3)(A)(ii). Because the SPP was unfunded, see Second Amended Compl., Ex. C., the FDIC could reasonably determine that, in wrapping up the affairs of Meritor, paying severance pay to plaintiffs would be "burdensome." *Morton* v. *Arlington Heights Federal Sav. & Loan*, 836 F.Supp. 477, 485 (N.D. Ill. 1993) ("Any unnecessary payment is burdensome to an insolvent institution" (emphasis in the original)). Pursuant to its authority under section 1821(e), the FDIC immediately repudiated the SPP on the day of its appointment as receiver. On the day Meritor was closed, the FDIC closing manager, Jack Goodner, informed Meritor employees that they would not receive severance pay. Def. Ex. 4, Goodner Dep. p. 26-27. While this repudiation may have been informal, it was clear, unambiguous and reasonable under the circumstances. See *Lawson* v. *FDIC*, 3 F.3d 11, 15 (1st Cir. 1993).

The court's scope of review of the FDIC decision to repudiate is very limited. Cf. *Howell*, 986 F.2d at 572 ("litigant would normally have an uphill battle in overturning an FDIC finding of 'burden'"); *Atlantic Mechanical, Inc.* v. *RTC*, 772 F.Supp. 288 (E.D. Va. 1991) (abuse of discretion standard applied), aff'd, 953 F.2d 637 (4th Cir. 1992); *Morton* v. *Arlington Heights Federal Sav. & Loan*, 836 F.Supp. 477, 484-85 (N.D. Ill. 1993) (questioning whether a district court has jurisdiction to review a receiver's repudiation of a contract). The receiver has wide discretion to decide what is burdensome. 12 U.S.C. § 1821(e)(1)(B); *1185 Ave. of America Assoc.* v. *RTC*, 22 F.3d 494, 498 (2d Cir. 1994). The receiver does not have to give reasons for that decision. *1185 Ave. of America Assoc.*, 22 F.3d at 498;

Morton, 836 F.Supp. at 485. Because the receiver did not desire to continue the employment of any of the plaintiffs, it was reasonable for the FDIC to repudiate the SPP and the individual letters. See *Morton*, 836 F.Supp. at 485-86.

2. Actual direct damages

The plaintiffs ability to recover for damages caused by the FDIC's repudiation of the SPP are limited to actual direct compensatory damages. 12 U.S.C. § 1821(e)(3). Severance payments are not such damages. *Howell* v. *FDIC*, 986 F.2d 569 (1st Cir. 1993). Therefore, plaintiffs' claims for damages do not survive.

In *Howell* v. *FDIC*, 986 F.2d 569 (1st Cir. 1993), four officers of a failed bank brought suit against the FDIC for severance pay. The bank by letter agreement[9] promised the officers severance pay in the event of termination. 986 F.2d at 570. The letters made clear that these agreements did not alter the "at will" employment relationship between the parties. *Id.* The officers alleged that the FDIC knew of and approved of their agreements with the bank. *Id.* at 571. After the bank failed, the FDIC was appointed receiver. *Id.* Within two months, the officers were terminated. The officers filed claims for severance pay with the FDIC. The FDIC disallowed these claims as violative of public policy. *Id.* The district court ruled that the FDIC lawfully repudiated the contracts between the plaintiffs and the bank and that under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") 103 Stat. 183 (codified in various sections of 12 and 18 U.S.C.), there were no compensable damages for the resulting breach. *Id.*

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[9] These letters did not create an ERISA employee welfare benefit plan. *See Deibler* v. *Local Union 23*, 973 F.2d 206, 209 (3d Cir.1992). The letters were specifically addressed to a small group of bank officers and were simple contracts and not an employee welfare benefit plan.

Because the Howell court found that the FDIC validly repudiated the plaintiff officers' contracts, its decision focused on whether the officers could recover damages for the repudiation of those contracts. See 12 U.S.C. § 1821(e)(3). A receiver's liability for repudiation of any contract is limited to actual direct compensatory damages suffered by an aggrieved person as a result of the repudiation. 12 U.S.C. § 1821(e)(3)(A)(i). The Howell court held that the officers' claims did not comprise allowable claims under FIRREA, because severance payments are not "actual direct compensatory damages" under 12 U.S.C. § 1821(e)(3)(A)(i). *Id.* at 572-73. The court concluded that severance payments are at best an estimate of likely harm made at a time when only prediction is possible. When discharge actually occurs, the employee may have no way to prove the loss from alternative employments foregone, not to mention possible disputes about the discharged employee's ability to mitigate damages by finding new employment. A severance agreement properly protects against these uncertainties by liquidating the liability. Such payments comprise or are analogous to "liquidated damages," at least when the amount is not so large as to constitute an unenforceable penalty. *Howell*, 986 F.2d at 573.

The factual situation in *Office and Professional Employees Int'l Union* v. *F.D.I.C.*, 27 F.3d 598 (D.C. Cir. 1994) (hereinafter OPEIU) makes the case distinguishable from the case at bar. In OPEIU, the plaintiff union and its members had entered into a collective bargaining agreement with the National Bank of Washington. As part of this agreement the bank agreed to make severance payments in the event employees were terminated for economic reasons. Four days after the FDIC was appointed receiver, the FDIC met with union representatives and formally repudiated the collective bargaining agreement. The union filed claims with the FDIC for severance pay on behalf of its members. The FDIC denied these claims. The district court found for the FDIC.

On appeal, the union challenged the district court's decision that the FDIC was not liable for damages as a result of the repudiation. See 12 U.S.C. § 1821(e)(3) (limiting a receiver's liability to actual direct compensatory damages for repudiation of any contract). The OPEIU court reversed the district court's decision holding that the "employees had a right to severance pay as of the date of the appointment—albeit a contingent one—and that right should be treated essentially the same as the right to accrued vacation pay or health benefits." 27 F.3d at 601. The court held that the employees right to severance pay was vested since it was part of the employees' compensation package (*i.e.* part of the collective bargaining agreement) and therefore it had a real present value. *Id.*

The *OPEIU* decision is distinguishable from the case at bar because the DC circuit based its decision on the union's collective bargaining agreement. To illustrate the "real value" of the severance plan, the court stated that if the bank had repudiated the collective bargaining agreement the union could have gone to court under the Taft-Hartley Act for enforcement of the agreement including the value of the repudiated severance pay provisions. In the case at bar, however, the plaintiffs could not have enforced the SPP in court because Meritor had the right to terminate the SPP at will. Therefore, in the case at bar, the SPP had no real value at the date of insolvency and the court cannot base actual compensatory damages upon the severance pay program's provisions.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID A. CAMPBELL, JR., et al., Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for MERITOR SAVINGS BANK, Defendant.

Civil Action No. 93-3969

[Filed June 30, 1994]

ORDER

AND NOW, this 30th day of June, upon consideration of Plaintiffs' Motion for Class Determination, it is hereby ORDERED that the Motion is DENIED.

The plaintiffs seek to certify three classes: (1) the Separation Plan Class; (2) the Retiree Health Class and (3) the Life Insurance Class. The plaintiffs move to have the three classes defined as follows:

> (1) The SEPARATION PLAN CLASS comprises the plaintiffs Robert F. Hanna and Helen T. DeMarco, as class representatives, and all those former employees of Meritor Savings Bank, or its predecessors, who on December 11, 1992 became entitled to receive, or were entitled to receive, or were collecting separation pay under the Meritor Savings Bank Separation Pay Plan;
>
> (2) The RETIREE HEALTH CLASS comprises plaintiff David A. Campbell, Jr., as class representative, and all those retirees of Meritor Savings Bank, or its predecessors, who were entitled to health insurance under the Meritor Medical Plan 65 Special Option; and
>
> (3) the LIFE INSURANCE CLASS comprises plaintiffs David A. Campbell, Jr. and Robert F. Hanna, as class representatives, and all those employees of Meritor

Savings Bank who on December 11, 1992 and all those retirees of Meritor Savings Bank, or its predecessors, who were entitled to life insurance under the Meritor Group Life Insurance Plan.[1]

See Plaintiffs' Proposed Order

REQUIREMENTS OF 23(a)

The plaintiffs bear the burden of establishing the four threshold requirements of Rule 23(a): that the class is so numerous that joinder of all members is impracticable, (2) that there are questions of law or fact common to the class, (3) that the claim or defenses of the representative parties are typical of the claims or defenses of the class, and (4) that the representative parties will fairly and adequately protect the interests of the class. *Lloyd v. City of Philadelphia*, 121 F.R.D. 246 (E.D. Pa. 1988). The plaintiffs' failure to establish any one of these requirements is fatal to a motion for class certification. *Id.*

1. Impracticability of Joinder

The plaintiffs argue that each of the classes are so numerous that joinder of all members is impracticable. *see* Responses of Defendant to Plaintiffs' First Set of Interrogatories (Interrog. 6: Separation Plan Class - approximately 964 members; Interrog. 36: Retiree Health Class - approximately 482 members; Life Insurance Class - approximately 1446 members (the combination of the Separation Plan and Retiree Health classes)).

Under 12 U.S.C. § 1821(d), claims against the FDIC as receiver for Meritor must be filed pursuant to strict statutory requirements. The proposed class representatives each assert that they have filed suit within the prescribed statutory

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[1] The Life Insurance class is comprised of all members of the Separation Plan Class and the Retiree Health Class. See Pls.' Mem. at p. 13.

period.[2] *See* Compl. ¶¶ 57, 58, 83, 109, 100; 12 U.S.C. §§ 1821(d)(6)(B).

The plaintiffs have made an insufficient showing that all potential class members have filed a Proof of claim with the FDIC[3] and/or may commence an action in federal court.[4]

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[2] The court notes that the FDIC asserts that plaintiff David A. Campbell, Jr. cannot adequately represent the Retiree Health Class because he filed his claim in federal court five days too early. See Def. Mem. p. 7 n.2; Lussier Certification ¶ 5. At this juncture, it is unnecessary for the court to decide whether Mr. Campbell has complied with section 1821(d)(13)(D)'s exhaustion requirement, or alternatively, whether requiring exhaustion in this case would be futile in light of the FDIC's position on the merits of Mr. Campbell's claim. *See Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 395 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 582 (1991). Nevertheless, if Mr. Campbell lacks standing to sue on his own behalf because of his failure to follow section 1821(d)'s procedural requirements, he cannot properly sue in the capacity of a class representative. *Commonwealth of Pennsylvania v. National Ass'n of Flood Ins.*, 520 F.2d 11, 24 n.28a (3d Cir. 1975), *overruled on other grounds*, 659 F.2d 306, 318 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

[3] The case at bar can be distinguished from *Office & Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63 (D.C. Cir. 1992). In *Local 2*, the union filed group claims for benefits with the FDIC as receiver. *Id.* at 64. Nothing in the record indicates that the plaintiffs in this case filed a group claim with the FDIC for benefits. Moreover, even if the named plaintiffs had filed claims on behalf of all potential class members with the FDIC, the adequacy of their representation must be checked pursuant to Fed. R. Civ. P. 23(a)(4). *Id.* at 6. In contrast in cases where a union files suit on behalf of its members, a neutral government agency has already certified a union as the "exclusive representative" of the employees. *Id.*

[4] The approximately 158 plaintiffs in the related case of

See 12 U.S.C. § 1821(d)(13)(D); *see also Althouse v. Resolution Trust Corp.*, 969 F.2d 1544, 1546 (3d Cir. 1992) (claimant who fails to file a timely claim under section 1821(d)(5)(C) is precluded from filing suit in district court); *FDIC v. Shain, Schaffer & Rafanello*, 944 F.2d 129, 134-36 (3d Cir. 1991) (18 U.S.C. § 1821(d)(13)(D) bars court jurisdiction to hear claims, absent compliance with section 1821(d) requirements); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975) (complaint containing no allegation that class members have filed application with federal agency for relief, much less that any decision of which review is sought, is deficient, and therefore court lacks jurisdiction over complaint as concerns the class). The record is insufficient to show how many members of each potential class have fully complied with section 1821(d)'s jurisdictional requirements.[5] Therefore, the plaintiffs have made an insufficient showing that the joinder of all members is impracticable. The court is unable to find that futility excused exhaustion on the

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Adolf, et al. v. Federal Deposit Insurance Corporation as Receiver for Meritor Savings Bank, Civ. No. 94-1499, assert that they have all filed timely claims with the FDIC and that the FDIC has rejected these claims. Compl. No. 94-1499, ¶¶ 35, 50, 66. The FDIC asserts that "approximately 77 Adolf plaintiffs failed to file receivership claims." Lussier Certification, ¶ 7.

The ten plaintiffs in *Hennessey, et al. v. Federal Deposit Insurance Corporation as Receiver for Meritor Savings Bank*, No. 93-5589, and the single plaintiff in *Callahan v. Federal Deposit Insurance Corporation as Receiver for Meritor Savings Bank*, No. 94-1949, also assert that they have all filed timely claims with the FDIC and that the FDIC has rejected these claims.

[5] The FDIC asserts that "[a]pproximately 800 Meritor retirees and former employees filed claims with the Receiver (not all of them for the benefits at issue in this action and not all of them timely)." Lussier Certification, ¶ 3.

present record. *See Rosa v. Resolution Trust Corporation*, 938 F.2d 383, 395 (3rd Cir. 1991).

2. Common Question of Law and Fact

The "threshold of commonality is not high." *In re School Asbestos Litigation*, 789 F.2d 996, 1010 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). The plaintiffs have satisfied Rule 23(a)(2)'s commonality requirements for the three classes. The plaintiffs' factual claims center on the appointment of the FDIC as receiver for Meritor, the termination of the employees of Meritor and the continuing validity of certain benefits promised by Meritor to its employees prior to the FDIC takeover. Common questions of law include: whether the FDIC violated the ERISA rights of the class members when it terminated their welfare benefit plans; and whether the FDIC abused its discretion in denying the plaintiffs' claims.

3. Typicality

The typicality requirement requires the court to examine whether "the named plaintiff's individual circumstances are markedly different or the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.), *cert. denied*, 474 U.S. 946 (1985).

For the reasons outlined above, the plaintiffs have made an insufficient showing that all potential class members have filed a Proof of Claim with the FDIC and/or may commence an action in federal court. Therefore, the plaintiffs have made an insufficient showing that the representatives' claims are typical of the claims of the potential class members.

Alternatively, plaintiffs Robert F. Hanna and Helen T. DeMarco have made an insufficient showing that they are typical of all Meritor employees covered by the Separation Pay Program. Proposed representatives Robert F. Hanna and

Helen T. DeMarco seek to represent "all those former employees of Meritor Savings Bank, or its predecessors, who on December 11, 1992 became entitled to receive, or were entitled to receive, or were collecting separation pay under the Meritor Savings Bank Separation Pay Plan." By its terms the Separation Pay Program applied to "all employees" of Meritor. The proposed representatives base their action solely upon the Separation Pay Program. Compl., ¶¶ 40-66.

The court notes that the plaintiffs in two related action presently before this court, *Hennessey, et al. v. Federal Deposit Insurance Corporation as Receiver for Meritor Savings*, No. 93-5589, and *Callahan v. Federal Deposit Insurance Corporation as Receiver for Meritor Savings Bank*, No. 94-1949 (the Hennessey plaintiffs), base their claims on both the Separation Pay Program and separate letters dated October 3, 1990. *See* Second Amended Compl. No. 93-5589, ¶¶ 14, 15. Meritor sent the October 3, 1990 letters to its senior management. All Hennessey plaintiffs received these letters.

Plaintiffs Robert F. Hanna and Helen T. DeMarco claims are not typical of all Meritor employees covered by the Separation Pay Program. Neither Robert F. Hanna nor Helen T. DeMarco received the October 3, 1990 letter. Plaintiffs Hanna and DeMarco's reliance solely on the Separation Pay Program may hamper their full, fair and vigorous prosecution of the Hennessey plaintiffs' claims. *See Lloyd*, 121 F.R.D. at 250. Because of this, these class representatives may not adequately represent the Hennessey plaintiffs or other similarly situated persons.

Additionally, the Separation Plan Class plaintiffs seek to represent "all those former employees of Meritor Savings Bank . . . who on December 11, 1992 . . . were entitled to receive, or were collecting separation pay under the Meritor Savings Bank Separation Pay Plan." However, neither Robert F. Hanna nor Helen T. DeMarco were receiving severance on

December 11, 1992. Therefore, they are not typical of this subclass of plaintiffs.

4. Representation

The named plaintiffs must demonstrate that they will fairly and adequately represent the interests of the classes they seek to represent and that their interests are not antagonistic to those of other class members of the classes as defined. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). The plaintiffs have made an insufficient showing that they have satisfied this requirement, because of the potential conflict between the interests of the named class members and the interests of those class members who have not filed claims with the FDIC, and because of the potential conflict between the interests of the named class members and the interests of the Hennessey plaintiffs.[6]

The plaintiffs also seek to have the Separation Plan Class defined so that it includes "all those former employees of Meritor Savings Bank . . . who on December 11, 1992 . . . were entitled to receive, or were collecting separation pay under the Meritor Savings Bank Separation Pay Plan." The FDIC asserts that it has allowed properly filed claims for severance pay benefits of those former employees who were

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[6] The plaintiffs have failed to establish whether, if successful, the FDIC will be able to fully compensate the proposed classes. Pursuant the parties' stipulation, a judgment in favor of the plaintiffs would be paid in the form of receivership certificates from the receivership funds of the former Meritor Savings Bank. Stipulation Entered on June 20, 1994, ¶ 1. Any judgment against the FDIC, as receiver for Meritor, will not create a general obligation against the FDIC. *Id.* The dividend currently being paid with respect the certificates is 87.3%. *Id.* ¶ 2. The parties agreed that in the future, "proven claims will be paid the pro data distribution that has been paid on all other claims in that particular class." *Id.* ¶ 3.

already receiving severance pay at the time the bank closed. Lussier Certification, ¶ 6. The FDIC further asserts that claimants will receive receivership certificates the future. *Id.* Therefore, the claims for severance pay by former employees who were already receiving severance pay at the time the bank closed appear to be moot.

CERTIFICATION UNDER RULE 23(b)(1) & (b)(2)

Assuming *arguendo* that the plaintiffs could satisfy the requirements of Rule 23(a), class certification under Rule 23(b)(1) and (b)(2) would still be inappropriate. The court concludes that the essence of the plaintiffs' claims are for damages. Stipulation Entered on June 20, 1994 (judgment in favor of the plaintiffs would be paid in the form of receivership certificates); *see also Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 393 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 582 (1991). Therefore, certification is not appropriate under Fed. R. Civ. P. 23(b)(2) because the appropriate final relief relates predominantly to money damages. *In re School Asbestos Litigation*, 789 F.2d 996, 1008 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); Fed. R. Civ. P. 23(b)(2) advisory committee notes (1966 amendments).

Certification under Rule 23(b)(1) is also not appropriate. The plaintiffs have made an insufficient showing under Rule 23(b)(1)(B) that a judgment against the individual plaintiffs would as a practical matter substantially impair or impede the ability of other potential plaintiffs to protect their rights. The plaintiffs have not argued nor is there sufficient evidence in the record to show that the potential amount and scope of damages is larger than the funds available to the FDIC to compensate the plaintiffs in the event of a judgment in favor of the plaintiffs. *See In re School Asbestos Litigation*, 789 F.2d at 1005. Nor have the plaintiffs demonstrated that

denial of class certification under Rule 23(b)(1)(A) would create incompatible standards of conduct for the FDIC.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

APPENDIX I

John T. HENNESSY; Michael B. High; William A. Bracken; Larry Gibson; Martha C. Hitchcock; Laurence A. Liss; Ken Mancini; George S. Rapp; Roberta Griffin Torian; Frank J. Soriero

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Meritor Savings Bank (D.C. Civil No. 93-cv-05589).

Thomas CALLAHAN

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Meritor Savings Bank (D.C. Civil No. 94-cv-01949). Appeal of John T. HENNESSY, Roberta Griffin Torian, Michael B. High, William Bracken, Laurence Liss, Marty Hitchcock, George S. Rapp, Kenneth R. Mancini, Lawrence J. Gibson, Frank J. Soriero and Thomas Callahan, Appellants

David A. CAMPBELL, Jr.; Robert F. Hanna; Leslie Voth; Helen T. DeMarco, individually, and Robert F. Hanna; Helen T. Demarco, on behalf of themselves and all others similarly situated, (Separation Plan Class), and David A. Campbell, Jr., on behalf of himself and all others similarly situated, (Retiree Health Class), and David A. Campbell, Jr.; Robert F. Hanna, on behalf of themselves and all others similarly situated, (Life Insurance Class)

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for Meritor Savings Bank. Appeal of David A. CAMPBELL, Jr., Robert F. Hanna, Helen T. DeMarco and Leslie Voth, Appellants

Joseph A. ADOLF, Laurence J. Arnold, Christian F. Aurig, George W. Barber, Linda C. Barch, Richard F. Bate, Owen J. Behen, Lauren Bethea, Elizabeth L. Blankenhorn, Anne Marie Boback, Susan M. Brown, John J. Buczek, George S. Bunting, Mary Ann C. Burch, Edith Burkeitt, Thomas P. Callahan, David A. Campbell, Jr., Karla J. Carney, John M. Casamento, Jr., William J. Cathcart, Lisa Cavalli, Nancy L. Ceffaratti, Joseph D. Cellucci, Esther Cerbo, Carole A. Circucci, Anthony R. Coogan, Larry A. Cook, Samuel J. Cook, Wallace P. Cooney, Paul L. Coppola, Lorene C. Coquillette, Betty R. Corley, Harriet S. Corley, Joan T. Corson, David E. Coverdale, Mary C. Craige, Louis T. Cullen, John F. Culp, Edward D. Custer, Michael Czincila, Joan E. Debes, Irene V. Delizzio, Gail L. Delviscio, Harold L. Dempsey, Harold C. Dengel, Debra Anne Denight, Beatrice L. Desher, Joseph H. Devore, Jr., Anna S. Difelice, Mario Difelice, Mary Ann Digregorio, Leonid A. Dobrinin, Sarah S. Doody, Joseph M. Duffy, Leonard T. Ebert, John A. Fatula, Charles J. Ferrie, George W. Fetters, Jr., Lore L. Fisher, John P. Fogarty, Cynthia M. Ford, Doris Gagliardi, Barbara A. Gibson, Frances J. Gillen, William R. Goettle, Charles W. Gray, III, Eugene A. Heiwig, William H. Hilliard, William H.H. Hsu, Stanley E. Hunt, Charles C. Jones, Thomas C. Keiser, Kathleen F. Kelly, Lynn M. Kelly, Ethel S. Keowen, John Andrew Kinnerman, Philip W. Klinger, C. Andrew Krepps, Jr., John David Lambert, Michael G. Lewis, Patricia Leuthy, Salvatore Lizzio, Aldo S. Lombardi, Elisabeth W. Lord, Kathleen Lynch, E. David MacNally, William C. MacNeill, Jr., Frank Joseph Marullo, Edward M. Mason, Jr., Thomas G. Marvel, Ruth A. McAllister, Joseph F. McCole, Christine D. McCormick, Philip J. McCormick, Janet B. McCourt, David C. Melnicoff, Freda I. Millar, Anthony M. Mingarino, Joseph J. Moffa, Linda Lee Montana, Barbara L. Morgan, Marion D. Morgan, Leonard V. Morris, David D. Morrison, Mary T. Murphy, Anthony J. Nocella, William A. Norris, III, Martha K. Nylund, Mary E. Orr, John T. Osmian, Charles E. Padgett,

Patricia Pawling, Howard F. Pearce, Catherine P. Piccone, Peter P. Pryzbylkowski, Darlene E. Purugganan, Elizabeth L. Rafetto, Edward W. Rapp, Luba K. Reilly, Louise M. Reitano, Antoinette D. Rendino, Ms. Jamie Rindock, Jean Davis Robinson, Richard Rogers, Diane S. Rohr, Herbert A. Roth, Anthony J. Santilli, Jr., Kathleen M. Sawchynsky, Ruth C. Schmidt, Michael F. Scutti, Martin Selgrath, John W. Semple, Joseph F. Slane, Robert A. Smalley, Elizabeth K. Sonneborn, Fred B. Staas, Walter R. Staples, Robert C. Steinman, Arthur W. Stettler, Jean J. Stubbs, Anthony Tabasco, Robert B. Taylor, Annita L. Tedesco, Kenneth C. Thomas, Patricia E. Thompson, Dianne T. Tindall, James M. Toolan, Morris Varano, Stanley J. Verbeek, Donna Volz, Leslie C. Voth, Theresa M. Webb, Cynthia West, Robert B. Whitelaw, Alton T. Winner, Jr., Anne M. Wise, Verdella Wright, Anthony J. Zongaro and Lina G. Zanoni, Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Meritor Savings Bank.

Nos. 94-1857, 94-1933 and 94-1934.

United States Court of Appeals,
Third Circuit.
Sept. 26, 1995.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Nos. 93-cv-05589, 93-cv-03969.

Before: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN and GARTH[1] Circuit Judges.

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[1] As to panel rehearing.

SUR PETITION FOR REHEARING

COWEN, Circuit Judge.

The petitions for rehearing filed by appellants in Nos. 94-1857; 94-1933 and 94-1934 having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

APPENDIX J

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1821(e) provides in pertinent part:

(1) Authority to repudiate contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease—

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

* * *

(3) Claims for damages for repudiation

(A) In general

Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be—

(i) limited to actual direct compensatory damages; and

(ii) determined as of—

(I) the date of the appointment of the conservator or receiver;

* * *

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include—

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

* * *

Section 402 of the Employee Retirement Income Security Act of 1974, Pub. L. No. 94-406, 88 Stat. 832, 875, 29 U.S.C. § 1102, provides in pertinent part:

* * *

(b) Every employee benefit plan shall—

* * *

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan.

* * *

Supreme Court, U.S.
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Nos. 95-1000 and 95-1002

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN T. HENNESSY, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MERITOR SAVINGS BANK, ET AL.

ROBERT F. HANNA, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation (FDIC), acted within its discretion under 12 U.S.C. 1821(e)(1) in repudiating a failed depository institution's severance plan.

2. Whether severance benefits allegedly payable to former employees of an insured depository institution upon their involuntary termination are recoverable against the FDIC, as receiver, as "actual direct compensatory damages" within the meaning of 12 U.S.C. 1821(e)(3).

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 58 F.3d 908. The opinion of the district court in No. 95-1000 (*Hennessy, et al.* v. *FDIC* (Pet. App. 49a-60a)) is reported at 858 F. Supp. 483. The opinions of the district court in No. 95-1002 (*Campbell, et al.* v. *FDIC* (Pet. App. 35a-47a) and *Adolf, et al.* v. *FDIC* (Pet. App. 33a-35a)) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1995. A petition for rehearing was denied on

[1] "Pet. App." refers to the appendix to the petition in No. 95-1002.

September 26, 1995. Pet. App. 70a-73a. The petitions for writs of certiorari in No. 1002 (Hanna Pet.) and No. 1000 (Hennessy Pet.) were both filed on December 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 11, 1992, the Secretary of Banking of the Commonwealth of Pennsylvania declared Meritor Savings Bank (Meritor) insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) receiver. Pet. App. 5a. In its capacity as receiver, the FDIC executed a Purchase and Assumption Agreement transferring a portion of Meritor's assets and liabilities to Mellon Bank (Mellon). *Ibid.* Under the terms of the Purchase and Assumption Agreement, the FDIC retained the liabilities not assumed by Mellon and the assets not purchased by Mellon, which it proceeded to liquidate for the benefit of Meritor's approved creditors. *Ibid.*

2. Prior to its insolvency, Meritor had maintained an unfunded employee welfare benefit plan, known as the Separation Pay Plan (SPP). The SPP provided severance benefits (based on years of work, up to a maximum of 26 weeks' salary) to employees who were involuntarily terminated due to "lack of work, job elimination, reorganization or reduction-in-force." Pet. App. 5a. "Lack of work" was a defined term that applied only when, as the "result of a decrease in volume of work to be done, a position [wa]s temporarily not needed." *Id.* at 15a. "Job elimination" occurred under the SPP only when, "as a result of a reorganization, changing business needs, or the sale, closure or relocation of an office, a specific position [wa]s determined to be unnecessary to the company

for an indefinite period of time." *Id.* at 14a. Meritor retained discretionary authority to modify or discontinue the SPP in whole or in part at any time. *Id.* at 6a.

3. On the day the Pennsylvania Secretary of Banking declared Meritor insolvent, the FDIC's closing manager informed the employees that the FDIC would not make severance payments. Pet. App. 7a. At the close of business that day, Meritor's former employees became employees of Keytech Resources, Inc., a company established to provide staffing for the Meritor offices that had been purchased by Mellon. *Ibid.* Mellon paid severance benefits to those employees who were subsequently laid off. Their payments were based on their years of service with Meritor, up to a maximum of four weeks salary per employee. *Ibid.*

4. In July, 1993, four of the current Hanna petitioners (one retiree and three individuals who had been Meritor employees on December 11, 1992) filed suit against the FDIC, as receiver, in the United States District Court for the Eastern District of Pennsylvania on behalf of themselves and a class of similarly situated employees (the *Campbell* suit). The other Hanna petitioners (a group of former Meritor employees and retirees) filed suit against the FDIC solely in their individual capacities (the *Adolf* suit). Ten former Meritor managers (the Hennessy petitioners) also sued the FDIC in their individual capacities (the *Hennessy* suit).[2] Pet. App. 8a-11a. All

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[2] One former Meritor manager, Thomas Callahan, filed his own suit challenging the receiver's denial of severance benefits. Callahan's complaint was identical to that filed by the Hennessy plaintiffs, his case was tried alongside theirs, and the *Hennessy*

three suits sought, *inter alia*, severance benefits under the SPP.[3] *Ibid.*

The Hennessy petitioners argued before the district court that their severance rights under the SPP were triggered because they were terminated as part of a "reorganization." Pet. App 8a. The Hanna petitioners claimed (in *Campbell* and *Adolf*) that they were entitled to severance payments because they were involuntarily terminated due to "job elimination" or "lack of work." *Id.* at 14a. Petitioners all alleged, in addition, that the FDIC did not properly repudiate the SPP under 12 U.S.C. 1821(e)(1), Pet. App. 18a, and that, even if the FDIC did properly repudiate the SPP, they were entitled to severance benefits as "actual direct compensatory damages" under 12 U.S.C. 1821(e)(3), Pet. App. 21a.

On July 29, 1994, the district court ruled for the FDIC in *Hennessy* on the parties' cross-motions for summary judgment. Pet. App. 49a-60a. The court rejected the Hennessy petitioners' assertion that their termination resulted from a reorganization of Meritor. It explained that "the FDIC was involved with the termination of Meritor rather than the continuation of its business." *Id.* at 54a. Because the right to severance had not been triggered, and Meritor (and, later, the FDIC) retained the right to terminate the SPP at will, the court concluded that,

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decisions by the district court and court of appeals disposed of Callahan's claims. Pet. App. 1a, 49a, 70a. Callahan's petition is consolidated with those of the Hennessy plaintiffs.

[3] Among other things, the Hanna petitioners also sought benefits under Meritor's retiree health and life insurance plans. Those claims were rejected by the district court (Pet. App. 43a-44a) and the court of appeals (*id.* at 25a-28a), and they have not been renewed before this Court.

at the time Meritor was closed, the Hennessy petitioners had no vested rights to severance benefits. *Id.* at 55a-56a. The court further concluded that, upon its appointment as receiver, the FDIC had lawfully repudiated the SPP, under 12 U.S.C. 1821(e)(1), and that the Hennessy petitioners' claims for severance benefits were not claims for "actual direct compensatory damages" under 12 U.S.C. 1821(e)(3). Pet. App. 56a- 60a.

Relying on its decision in *Hennessy*, the district court rejected the Hanna petitioners' claims for severance benefits, granting summary judgment for the FDIC in *Adolf* (Pet. App. 33a-34a) and in *Campbell* (*id.* at 35a-47a).

5. The court of appeals affirmed. It agreed with the district court that the closure of Meritor and the appointment of the FDIC as receiver did not trigger a right to benefits under the SPP because those events did not constitute a reorganization. Pet. App. 12a-15a. The court noted that both Congress and the courts have recognized that, unlike a conservator (which preserves the institution as a going concern), a receiver is empowered to liquidate the institution and wind up its affairs. *Id.* at 13a (citing *RTC* v. *Cedar-Minn Bldg. Ltd. Partnership*, 956 F.2d 1446, 1454 (8th Cir.), cert. denied, 113 S. Ct. 94 (1992); *FDIC* v. *Grella* 553 F.2d 258, 261 (2d Cir. 1977); H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 396 (1989)). Here, the court found, the FDIC's sale of some of Meritor's assets to Mellon, Mellon's assumption of some of Meritor's liabilities, and the FDIC's liquidation of the remaining Meritor assets for the benefit of Meritor's creditors were consistent with the winding up of a failed bank's affairs. Pet. App. 13a. In the court's view, to suggest that those transactions constituted a

"reorganization" of Meritor was to "turn a blind eye to the dispositive facts." *Ibid.*

The court also rejected the contentions by the Hanna petitioners that their rights to severance were triggered because they were involuntarily terminated either as the result of "job elimination" or as the result of "lack of work." The court observed that "no specific position" had been determined to be "unnecessary" for an "indefinite period of time," and no employee had been laid off because he or she was "temporarily not needed" as a "result of a decrease in volume of work." Pet. App. 14a-15a. Rather, Meritor's employees lost their jobs because "the Secretary of Banking closed the entire bank." *Ibid.*

The court went on to hold that, even if it were to assume that a triggering event had occurred: (i) petitioners had no vested right to severance pay prior to, or at the time of, the appointment of the FDIC as receiver (Pet. App. 15a-18a); (ii) the FDIC had properly repudiated the SPP (*id.* at 18a-21a); and (iii) petitioners were not entitled to severance benefits as "actual direct compensatory damages" arising from that repudiation (*id.* at 21a-42a).

ARGUMENT

Petitioners contend that this Court should grant certiorari to decide whether the court of appeals erred in holding that their claims for benefits were not claims for "actual direct compensatory damages," within the meaning of 12 U.S.C. 1821(e)(3), arising from the FDIC's repudiation of the SPP. Hanna Pet. 9-22; Hennessy Pet. 15-20. The Hennessy petitioners argue (Pet. 9-15), in addition, that the court of appeals erred in holding that the FDIC lawfully repudiated the SPP pursuant to the FDIC's longstanding view

that the payment of severance benefits is burdensome on the receivership and that the repudiation of a severance plan by the receiver promotes the orderly administration of the institution's affairs. Neither issue is properly presented for resolution in this case.[4] The court of appeals concluded that petitioners were not involuntarily terminated as the result of a reorganization or any other event that would have triggered their rights to benefits under the SPP. Petitioners therefore had no contractual right to severance pay,[5] and they would not be entitled to

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[4] The court of appeals' decision on the second issue is in accordance with the decisions of the other courts of appeals that have spoken to it. See Pet. App. 18a-21a. That issue would not warrant further review even if it were properly raised. The first issue, on the other hand, is one of considerable practical importance that has divided the courts of appeals. Compare *Howell* v. *FDIC*, 986 F.2d 569 (1st Cir. 1993) (no liability, because loss of severance benefits does not give rise to actual direct compensatory damages), with *Office and Professional Employees Int'l Union* v. *FDIC*, 27 F.3d 598 (D.C. Cir. 1994) (*OPEU*) (rejecting *Howell*, and concluding that FDIC is liable for severance payments), and *Monrad* v. *FDIC*, 62 F.3d 1169 (9th Cir. 1995) (agreeing with *OPEU*). In an appropriate case, it may merit this Court's review.

[5] The Hanna petitioners have not asked this Court to review the court of appeals' affirmance of the district court's conclusion that their rights to severance under the SPP were not triggered by their termination. Although the Hennessy petitioners' do not, in so many words, propose that this Court review the court of appeals' interpretation of the severance plan, they argue that the court of appeals erred in failing to "put itself in Meritor's shoes and ask what the word [reorganization] meant as used in the SPP." Hennessy Pet. 23; see generally *id.* at 20-26. We believe that the district court and the court of appeals correctly interpreted the SPP. In all events, the court of appeals' holding respecting the meaning of

damages from the FDIC even if this Court were to conclude that the FDIC improperly repudiated the SPP under 12 U.S.C. 1821(e)(1) or that the right to severance payments gives rise to "actual direct compensatory damages" within the meaning of 12 U.S.C. 1821(e)(3).[6]

1. Contrary to petitioners' characterizations (Hanna Pet. 9; Hennessy Pet. 21), the court of appeals held unequivocally that petitioners' involuntary termination did not trigger their rights to severance payments. The court stated plainly that it was "unpersuaded by [petitioners'] argument" and that it "agree[d] with the determination of the district court" that neither the facts nor the law "support[ed] the conclusion that the Hennessy plaintiffs were terminated as part of a reorganization." Pet. App. 12a-13a. The court elaborated as follows:

> The Secretary of Banking for the Commonwealth of Pennsylvania closed Meritor Savings Bank. The FDIC was appointed receiver and it sold some of Meritor's assets to Mellon. As part of this transaction, Mellon agreed to assume some of Meritor's liabilities. The FDIC proceeded to liquidate the remaining assets of Meritor for the benefit of Meritor's creditors. These actions are commensurate with the winding up of a failed

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the SPP is a matter of no general importance and warrants no further review.

[6] The Hennessy petitioners conceded below (C.A. Reply Br. 5) that the issue whether their claims were provable in the receivership "presents itself only if the Court [were to conclude] that the events of December 11 * * * triggered the plaintiffs' SPP rights." See also *id.* at 7-8 (reiterating the point).

> bank's affairs and the proper function of a receiver. To suggest that these actions constituted a reorganization of Meritor would turn a blind eye to the dispositive facts. *We therefore cannot conclude that the district court erred in its determination that Meritor did not undergo a reorganization that would trigger plaintiffs' rights to severance pay.*

Id. at 13a (emphasis added).

The court of appeals also clearly rejected the Hanna petitioners' claim that they were entitled to severance pay because of "job elimination" or "lack of work." After reviewing the definitions of those terms within the SPP, the court held that it "[could] not conclude" that " 'job elimination' triggered a right to severance pay," or that "a 'lack of work' as defined by the plan, triggered the right to severance benefits." Pet. App. 15a. The court of appeals' opinion flatly contradicts petitioners' assertion (Hanna Pet. 9) that the court harbored doubt about whether petitioners established a contractual right to severance pay.[7]

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[7] The court of appeals did note that, because it held that the FDIC had properly repudiated the SPP, it did not need to address the Hennessy petitioners' alternative contention (made for the first time at oral argument) that they had contractual rights to severance benefits on the bases of "job elimination" or "lack of work." Pet. App. 15a n.7. The absence of a decision below specifically addressing the Hennessy petitioners' belated contention does not mean that those petitioners have an unresolved contract issue that would have to be resolved on its merits if this Court were to reverse the court of appeals on the repudiation issue. Under well established law, the Hennessy petitioners waived their claims for severance benefits on the grounds of "job elimination" or "lack of work" by failing to raise those claims in the district court or in their appellate briefs, particularly in light of the fact that their belated claims

2. Petitioners cite the court of appeals' reference to its normal practice of committing the task of construing ambiguous contract terms to the fact finder after extrinsic evidence has been adduced (Pet. App. 18a) to support their assertion that "the court affirmed the district court's grant of summary judgment, solely on the ground that the FDIC had properly repudiated the Separation Plan and owed no damages under it." Hanna Pet. 11; see also Hennessy Pet. 21. The relevant passage of the court's opinion, however, emphasizes that the repudiation-related issues now raised by petitioners before this Court were addressed by the court of appeals only as alternative bases for affirming the district court.

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rely on factual assertions not developed in the record below. See *Hutchins* v. *IRS*, 67 F.3d 40, 45 (3d Cir. 1995) (refusing to consider issue raised for the first time in reply brief, and noting that waiver ruling was particularly appropriate because issue would require further factual development); *McLendon* v. *Continental Can Co.*, 908 F.2d 1171, 1183 (3d Cir. 1990).

Even if the Hennessy petitioners had not waived their claims for severance benefits on grounds of "job elimination" and "lack of work," those claims are foreclosed by the court of appeals' holding that those triggering events did not occur. The Hennessy petitioners' untimely assertion that they did not receive the November, 1989, plan documents defining "job elimination" and "lack of work," even if true, is of no consequence, because the Hennessy petitioners conceded in the district court that the November, 1989, revisions to the earlier plan document (which they did receive) did nothing "other than clarify the separation pay policy that had been in place prior to that time." Hennessy Pltf.'s Mem. Supporting Mot. for Summary Judgment 7-8 (quoting author of November 1989 document).

The court stated:

> *Having determined that there was no event that triggered the payment of severance benefits*, it would ordinarily be unnecessary to dispose of the other issues raised by the parties regarding their entitlement to severance pay, *i.e.*, repudiation and whether the failure to pay severance benefits constituted actual direct compensatory damages under FIRREA. However, the parties have forcefully argued their positions regarding the various 'triggering' provisions, and have at least implied that they are susceptible to more than one reasonable interpretation.

Pet. App. 18a (emphasis added). The court then went on to address alternative bases for affirming the district court. In doing so, however, the court indicated that it was not abandoning its antecedent holding that no triggering event had occurred. See *Ibid.* (noting that the court of appeals would rule for FDIC "even if [the court] were to assume a triggering event had occurred").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1995

ROBERT F. HANNA, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONERS

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STATUTE

12 U.S.C. § 1821(e)(3) 1

REPLY BRIEF FOR THE PETITIONERS

The FDIC concedes that the question presented is "one of considerable practical importance" and that the question "has divided the courts of appeals" (Br. in Opp. 7 n.4). In its attempt to dissuade this Court from reviewing a question that concededly "may merit this Court's review" (*ibid.*), however, the FDIC now denies that the court below actually *decided* the question whether the FDIC's breach of a contract to make severance payments results in "actual direct compensatory damages" under 12 U.S.C. § 1821(e)(3). Significantly, scarcely five months ago the FDIC whistled a different tune to the Ninth Circuit, in an unsuccessful effort to induce that court to rehear *en banc* one of the decisions (*Monrad* v. *FDIC*, 62 F.3d 1169 (1995)) with which the decision below squarely conflicts. Any reasoned examination of the Third Circuit's opinion makes clear that, notwithstanding the FDIC's opportunistic shift of position, the court below *did* decide the question presented by the petition. Further review is therefore entirely warranted.

1. The court below took pains to explain that its decision rested on the conclusion that, under Section 1821(e)(3), the petitioners are not entitled to "actual direct compensatory damages," regardless of the merits of their contractual claim for separation pay. The FDIC's contrary reading of the opinion (Br. in Opp. 6-11) is demonstrably wrong.

After it had discussed the "triggering" provisions of the severance pay contract, the court of appeals explained that it "would normally commit the task of construing ambiguous contract terms to the fact finder after extrinsic evidence has been adduced." Pet. App. 18a. The court then declared, however: "*We do not do so here* because even if we were to assume a triggering event had occurred"—that is, even if the court were to resolve in petitioners' favor the issue it "would normally commit" to the district court—it "would nonetheless affirm the district court's grant of summary judg-

ment" on the grounds that the FDIC validly repudiated the severance obligation and did not owe damages for the repudiation. *Ibid.* (emphasis added).

Somehow, the FDIC divines in this language an "unequivocal[]" (Br. in Opp. 8) decision that no triggering event occurred. The plain English words will not bear that meaning. Rather, the court below should be taken at its word: but for its (erroneous) resolution of the question presented, the court of appeals would have remanded the "triggering" question for resolution, in the first instance, by the district court.

Significantly, in an effort to downplay the court of appeals' *explicit* reservation on the triggering issue, the FDIC omits to quote crucial language from the court's opinion. Thus, although the FDIC includes a block quotation from the opinion below (Br. in Opp. 11), it truncates the quotation, excising the court's statement that it "would normally" remand for a construction of the contract, but "d[id] not do so here" because it had determined the question presented adversely to the petitioners. A full and fair rendering of the opinion reveals that the court of appeals rested its decision on its resolution of the legal question presented.

2. This reading of the court of appeals' decision is confirmed by a crucial procedural aspect of the case, which the FDIC completely overlooks. In particular, although the trial court resolved the *Hennessy* petitioners' triggering claim—that there was a "reorganization" of Meritor giving rise to a separation pay claim—it never actually addressed the *Hanna* petitioners' triggering claim—specifically, that "job elimination" or "lack of work" gave rise to a claim under the Separation Plan. Instead, the trial court effectively pretermitted the latter issue by simply incorporating by reference its prior opinion in *Hennessy*—which, as noted, addressed only whether the termination of the Meritor employees resulted from a "reorganization." See Pet. App. 14a n.6,

43a, 54a. This is a significant gap in the trial court's decision, since if it had addressed those claims, it would likely, at the very least, have denied summary judgment.*

As the Third Circuit apparently recognized, for a court of appeals to decide the contract issue for itself under these circumstances—where the district court had not first decided the issue—would have been jurisprudentially indefensible. *Cf. Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986) (if the district court "failed to make findings of fact essential to a proper resolution of the legal question, [the court of appeals] should have remanded to the District Court to make those findings"). Thus, if the disposition of this appeal had truly turned on the contractual "triggering" issue, the Third Circuit would have had to remand the case—as it said it "normally" would—for the district court to hear "extrinsic evidence" before "construing [the] ambiguous contract terms." Pet. App. 18a.

But, as it made unmistakably clear, the Third Circuit did "not do so here." Pet. App. 18a. Instead, the Third Circuit decided the question presented in the petition explicitly in order to obviate the remand that, by the court's own admission, would otherwise have been "normal[]." In sum, the decision below rests squarely on the court's conclusion that,

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* The testimony of Christine Kramer (*Campbell* C.A. App. 362.1a)—the Meritor officer who drafted the Separation Plan—that she believed that the Plan covered employees who were terminated as the result of a regulatory closure or receivership created at least a triable issue of fact precluding summary judgment on the question whether the petitioners' benefits under the Plan were "triggered" by their terminations on December 11, 1992. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 112 (1989) (the terms of an ERISA plan must be construed in light of all the circumstances *and* any admissible evidence of the sponsor's intent). See also *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 182-183 (1959) (form contract should not be construed to include a term—here, an exclusion covering bank failure or receivership—that the drafter had omitted).

as a matter of law, the petitioners were not entitled to compensatory damages for the breach of the severance pay contract. That question is therefore presented for further review.

3. The FDIC's insistence that the court below did not actually decide the question presented is especially puzzling in light of the agency's representations to the Ninth Circuit in a rehearing petition in *Monrad*. In *that* case, the FDIC maintained that the "*decision*[ ] of the United States Court of Appeals for the * * * Third Circuit[ ]"—not mere dictum or surplusage in the opinion—conflicted with the disposition of the "actual direct compensatory damages" issue in *Monrad*. Petition for Rehearing With Suggestion for Rehearing *En Banc* of the FDIC, *Monrad* v. *FDIC*, No. 93-56221, at i (9th Cir. filed Sept. 21, 1995) (emphasis added) ("FDIC *Monrad* Petition").

In its *Monrad* petition, the FDIC nowhere suggested what it now maintains—that the Third Circuit's decision was at best an alternative holding, unnecessary to the judgment. To the contrary, the FDIC argued that the "Third Circuit[ ] had *held* that severance pay did not constitute 'actual direct compensatory damages.'" FDIC *Monrad* Petition 5 (emphasis added). The FDIC insisted that the Ninth Circuit's resolution of the compensatory damages issue conflicted with the "contrary holding[ ]" of the Third Circuit in this case (*id.* at 6), a holding that the FDIC proceeded to explicate (*id.* at 10-11). Finally, the FDIC asserted that the decision below established "the law" of the Third "[C]ircuit[ ]" with respect to the "important and recurring legal question" presented both in the petition in this case and in the FDIC's rehearing petition in *Monrad*. *Id.* at 15. The FDIC offers no explanation for its emphatic reliance in the Ninth Circuit on the precedential force of a passage in the decision below that, it now says, decided nothing.

The FDIC got it right in its *Monrad* petition. The decision below clearly turned on the resolution of the "actual direct compensatory damages" question. That question is of conceded importance and concededly has divided the courts of appeals. Further review is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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